In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 92

MABEL BLACK and T. Y. WULFF, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members,

Petitioners,

vs.

CUTTER LABORATORIES, a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

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PRELIMINARY STATEMENT.

Petitioners have misstated the record in setting forth the questions presented in this cause. As a result, much of their argument relates to points which are not before the court.

While each of petitioners' contentions can and will be answered, it is obviously of first importance that the questions presented be clearly and accurately stated.

QUESTIONS PRESENTED.

The Arbitration Board found as a fact that Doris Brin Walker, the employee who was discharged, was a member of the Communist Party "with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail" (R. 29).

The court below accepted this finding as "clearly supported" by the evidence (R. 476) and then held that "an arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of 'sabotage, force, violence and the like' be reinstated to employment in a plant which produces antibiotics used by both the military and civilians is against public policy, as expressed in both federal and state laws, is therefore illegal and void and will not be enforced by the courts" (R. 478-479).

The questions presented on this record are as follows:

1. Does any provision of the United States Constitution forbid a State to withhold the process of its courts from the enforcement of an arbitration award which directs the reemployment in a defense plant of a member of the Communist Party who is dedicated to that party's program of sabotage, force, violence and the like?

2. Did the enactment by Congress of the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954 have the result of prohibiting a State from withholding the process of its courts from the enforcement of such an arbitration award?

STATEMENT OF THE CASE.

1. THE ARBITRATION BOARD FOUND THAT DORIS BRIN WALKER WAS A MEMBER OF THE COMMUNIST PARTY "WITH THE FULL IMPLICATIONS OF DEDICATION TO SABOTAGE, FORCE, VIOLENCE AND THE LIKE, WHICH PARTY MEMBERSHIP IS BELIEVED TO ENTAIL".

Petitioners make clear at the outset of their brief that the elaborate argument they present is premised upon the validity of their contentions (1) that the Arbitration Board did *not* make the finding stated in the heading and (2) that, assuming the Board did make such a finding, the finding is "entirely without evidentiary support" (Pet. Br. 6). If these contentions are not valid, their entire argument falls apart. Accordingly, we turn directly to a demonstration that the contentions are without merit.

The majority of the Arbitration Board stated its findings as follows (R. 29):

> "The Company maintains that *the basis for the discharge was two-fold:* the omissions and falsifications in the Application for Employment and *membership in the Communist Party with the full implications of dedication to sabotage, force, violence, and the like, which Party membership is believed to entail.**

*Throughout this brief, emphasis is ours unless otherwise noted.

That the Company honestly believed all of these things is admitted and *the accuracy of those beliefs is established in the record* as follows: by admission with respect to the omissions and falsifications in the Application for Employment; by undenied and uncontradicted evidence with respect to the membership in the Communist Party; and by uncontradicted evidence that the Company's beliefs about the full implications of Party membership were prevalently understood and shared.

In this view of the record, and we take this view, we are unable to find that the Company has been denied a fair hearing by reason of our refusal to instruct Doris Walker to answer the questions put to her touching this issue. *Assuming that her answers would have been favorable to the Company's position, they would serve no more than to corroborate what we find is already established by the record;* and the Company offers no convincing reason why further corroboration is necessary. The Company's motions are accordingly denied."

This is not, as petitioners argue (Br. 26-28), a finding merely that respondent believed in good faith that Mrs. Walker was a member of the Communist Party dedicated to that Party's program of sabotage, force, violence and the like. At the hearing before the Board petitioners offered to stipulate to the existence of such good faith belief if respondent would withhold further inquiry into Mrs. Walker's motives and activities (R. 136) and respondent rejected the stipulation upon the express ground that it contended, and was

entitled to prove, *that Mrs. Walker was as a matter of fact a member of the Communist Party personally dedicated to and actively engaged in promoting the objectives of that Party* (R. 137-143).*

The passage quoted above from the award is open to no other interpretation than that the Board clearly understood respondent's contention, and that the Board intended to and did find that the fact was as respondent contended it to be. The Board first states the respondent's contention directly and without qualification; namely, that Mrs. Walker was discharged for "membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail." It notes that petitioners had admitted that respondent honestly believed such membership to exist, and then finds that the accuracy of such belief is established in the record. Finally, it denies respondent's motion that Mrs. Walker be directed to answer respondent's questions directed at establishing the fact of such membership in and dedication to the Communist Party and its program, on the ground that affirmative answers to the questions "would serve no more than to corroborate what we find is already established by the record."

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*The courts have held, in consonance with respondent's contention before the Arbitration Board, that an employer cannot justify the discharge of an employee on the ground that the employer believed in good faith that the employee had been guilty of misconduct, if, in fact, the employee was innocent (*National Labor Relations Board v. Industrial Cotton Mills* (C. A. 4th, 1953), 208 F. (2d) 87, 45 ALR 2d 880, *cert. den.* 347 U. S. 935, *National Labor Relations Board v. Cambria Clay Prod. Co.* (C. A. 6th, 1954), 215 F. (2d) 48, 53).

The foregoing interpretation of the Board's finding is confirmed by the setting in which the finding was made.

Mrs. Walker refused to answer any questions directed at establishing her Communist Party membership and activity on the ground that the questions "constituted an absolutely unwarranted invasion into my private beliefs" (R. 21, 161). The Arbitration Board ruled that these questions were material but it refused to instruct Mrs. Walker to answer the questions and left her at liberty to answer them or not "as she chooses" (R. 21, 160). It expressly warned her, however, that if she did not answer the questions, it would draw all justifiable inferences from the refusal (R. 21).

The Board's ruling in this regard and Mrs. Walker's response appear in the record as follows (R. 160-161):

> "The Chairman: We have come to a conclusion: that *we consider the question to be material.* The objection is overruled, but we want to couple the ruling with a statement of the Board: that we will not instruct the witness to answer if she does not care to answer the question, and she is at liberty to answer it or not to answer it as she chooses. *If she should refuse, her refusal to answer will stand in the record and, as in any case, the failure of a party to produce evidence justifies the fact-finding board in drawing inferences from it.* What inference we will draw from the refusal we have not determined now and we will let that await final determination of the case.

Do you want to answer the question?

The Witness: No I do not, Mr. Arbitrator.

The Chairman: All right.

Mr. Edises: Do you wish to explain your reasons for refusing to answer?

The Witness: Yes. It's very simple. I consider it a question of an absolutely unwarranted invasion into my private beliefs, and I know that it is nothing but a—the whole question is nothing but a red herring to obscure the real issue in the case."

Respondent protested against this ruling, claiming it had been denied its right of cross-examination and had been deprived of a fair hearing (R. 21-22, 189-190). The Board answered this protest, not by saying that respondent had no right of cross-examination but by saying that respondent had proved the full extent of its contentions by other evidence and that favorable answers elicited upon cross-examination would have been merely corroborative of this other evidence (R. 29, 372). In such a setting, the meaning of the Board's finding is clear; it intended to and did find that Mrs. Walker was a deliberate acting, dedicated member of the Communist Party.

Further, if there were any possible doubt as to the meaning of the Board's finding, that doubt has been dispelled by the opinion of the court below. That court interpreted the finding of the Board exactly as we have stated it in the heading and based its holding upon such interpretation (R. 476, 478, 483, 487, 489-490). Accordingly, the finding comes to this Court with the gloss of the Supreme Court of California

upon it (*Hotel & Restaurant Employee's International Alliance v. Wisconsin Employment Relations Board* (1942) 315 U. S. 437, 441; *International Brotherhood of Teamsters v. Hanke* (1950) 339 U. S. 470, 480), and petitioners' argument that the California court erred in this interpretation (Pet. Br. 27) is not one that can be properly addressed to this Court.

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2. THE FINDING OF THE ARBITRATION BOARD CONCERNING MRS. WALKER'S COMMUNIST PARTY MEMBERSHIP AND ACTIVITIES IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Petitioners introduce their statement of the case by reminding the Court that under California law the findings of fact of the Arbitration Board are conclusive and non-reviewable (Br. 6). They then devote 22 pages of their brief (pp. 7-29) to an analysis of the evidence before the Board directed at establishing that the "crucial" finding of the Board concerning Mrs. Walker's Communist Party membership and activities is "entirely without evidentiary support" and should be given no effect in the determination of the cause (Br. 6).

These two diametrically opposed concepts cannot be reconciled on any logical basis. Neither can petitioners' extended evidentiary argument be reconciled with the settled principle that this Court does not sit to review the findings of facts made in a state court (*Waters-Pierce Oil Co. v. Texas* (No. 1) (1908) 212 U.S. 86, 97; *Drivers Union v. Meadowmoor Co.* (1940) 312 U.S. 287, 294). Since the argument has

been made, however, and since to leave it unanswered might give the Court an erroneous impression of the record, we will briefly summarize the evidence which led the court below to hold that the Board's finding that Mrs. Walker was "a knowing and deliberately acting Communist" was "clearly supported" (R. 476).

a. The report to State Headquarters of the Communist Party.

Petitioners' statement of the case relegates to a footnote (Br. 19) the most damning evidence of Mrs. Walker's dedication to the Communist Party program and of her intent to take employment in respondent's plant for the purpose of furthering that program.

Respondent placed in evidence as its Exhibit 6 (R. 69, 72-73, 183-192, 390) a photostatic copy of a handwritten report by Mrs. Walker to the California State Headquarters of the Communist Party in which she stated, among other things, that

> "I tried to evaluate my action, as I try to evaluate whatever I do, from the point of view of the welfare of the working class and the strengthening of the Party."

This report was dated July 10, 1946, which was less than three months before Mrs. Walker applied for employment in respondent's plant. Mrs. Walker refused to answer any questions concerning this report, refusing even to identify her own signature on it (R. 183-195, 322, 427-430), but the hand in which the report is written is unquestionably the same as the one which wrote the application for em-

ployment (R. 41). Photolithographic copies of the report, and two employment applications which Mrs. Walker admittedly signed (Union Exh. No. 1 and Co. Exh. No. 1) are appended to this brief (*infra*, Appendix).

Concerning her motives in seeking employment in respondent's plant, Mrs. Walker was asked the direct question (R. 440):

> "Q. Isn't it a fact, Mrs. Walker, that at that time you were a member of the Communist Party and that the reason why you sought employment and filled out an application for employment at Cutter Laboratories was because you felt and believed, and had it in mind, that by obtaining that employment at that plant you could more actively and more effectively carry on the program and the activities of the Communist Party?"

Mrs. Walker refused to answer this question, and the Arbitration Board refused to instruct her to answer. Accordingly, it is one of the questions which, if answered affirmatively, would "serve no more than to corroborate" what the Board found to have been "already established by the record". (R. 29).

b. The conspiracy with Dr. Berke and Francis McTernan.

Mrs. Walker testified before the Arbitration Board that when she applied for employment with respondent she was asked by the lady who interviewed her for the names of two references (R. 100); that she gave the names of Dr. William R. Berke, a dentist,

and Francis McTernan, an attorney (R. 100); that thereafter she telephoned each of these professional men, explained that she had applied for employment with respondent and had given their names as references, and told them that she had concealed certain facts as to her education and previous experience, for the admitted purpose of suggesting to them that they assist her in withholding the true facts from respondent (R. 157-158, 220-223).

Respondent communicated with both Dr. Berke and Mr. McTernan concerning Mrs. Walker, and both of them responded (R. 155-156; Co. Exh. Nos. 2 and 3). Both scrupulously avoided any comment which would betray Mrs. Walker's falsifications, and both made affirmative misrepresentations in her behalf. Notwithstanding their knowledge of Mrs. Walker's duplicity, Dr. Berke rated her "excellent" for honesty (Co. Exh. 3) and Mr. McTernan brazenly stated (R. 42; Co. Exh. No. 2):

> "I know her well enough to state, without reservations, that she is scrupulously honest in all her dealings."

Dr. Berke was an instructor at the California Labor School, who in 1949 taught a course entitled "The Soviets—Fact and Myth. Everyday Life in the Soviet Union. How the Soviets Look at the World" (R. 42, 355-357; Co. Exh. No. 14). Francis McTernan was the brother of John Tripp McTernan, Mrs. Walker's superior when she worked for the Office of Price Administration in San Francisco, who was listed in the Fourth Report of the Joint Fact-Finding Com-

mittee of the California Legislature on Un-American Activities in California as having entertained members of the Communist Party and prominent Soviet leaders in his home (R. 42, 355-357; Co. Exh. No. 13).

With this background Mrs. Walker was asked the direct questions (R. 442):

> "Q. Isn't it a fact, Mrs. Walker, that the reason why you listed John Tripp as a previous employer and also why you gave Dr. William Berke as a reference and Mr. Francis McTernan, Jr. as a reference was because of the fact that you were a member of the Communist Party and that you knew that the two McTernans and Dr. Berke would cooperate with you in concealing from Cutter Laboratories the fact that you had previously been employed as an attorney with the OPA and the Gladstein firm?
>
> * * * * * * *
>
> Q. And isn't it a fact that the reason why you listed those individuals and concocted this fictitious employer was because of the fact that you were a member of the Communist Party at the time and that you desired to get into the Cutter plant in order to carry on more effectively and more actively the program and the activities of the Communist Party?"

Mrs. Walker refused to answer either of these questions, and the Arbitration Board refused to instruct her to answer. Accordingly, these questions, also, were ones which, if answered affirmatively, would "serve no more than to corroborate" what the Board found to have been "already established by the record" (R. 29).

c. Mrs. Walker's testimony before a Trial Examiner for the National Labor Relations Board.

On September 30 and October 1, 1948, Mrs. Walker appeared as a witness in support of her own back wage claim in a hearing before a Trial Examiner for the National Labor Relations Board (R. 182-193, 319; Co. Exh. No. 5). At this hearing she was asked whether she was a member of the Communist Party and whether she was then or had ever been a member of the Federal Workers Branch No. 3 of the Communist Party or of the South Side Professional Club of the Communist Party in San Francisco (Co. Exh. No. 5). She refused to answer any of these questions, notwithstanding that she concededly realized "the effect it may have on my case" (R. 319).

d. The Communist Party interview form.

At the hearing before the Arbitration Board Mrs. Walker was confronted with a report (Co. Exh. No. 23; R. 384) which stated that she had been issued 1945 Communist Party membership card #40360 and that on February 9, 1946, she stated in a Communist Party interview form that she joined the Communist Party in June, 1942; that she had held the positions of "Organizer," "Assistant Organizer," "Membership Director" and "Educational Director" of various Communist Party clubs and sections; that she had attended the Cercon Class of the State School of the Party in 1945 and that she should attend the State School again "to improve her work in shop and union"; and that she gave up law practice "because it was frustrating to work with people she had to

work with (namely, professional people)" and because "there was little connection between them and their activities *and the class struggle*" (R. 71). She was asked in meticulous detail as to the truth or falsity of each one of these statements of fact, and she refused to answer any of these questions (R. 424-426).

e. Other Communist Party offices and activities.

Mrs. Walker was asked numerous other questions concerning her membership in various clubs and sections of the Communist Party (R. 159, 164-165), various offices she had held in these clubs and sections (R. 165-167) and two Communist Party meetings she had attended (R. 167-171). She was also asked whether or not her real motive in leaving the practice of law and taking employment in various canneries and subsequently in respondent's plant was to carry on more actively and effectively the program and activities of the Communist Party (R. 438-440, 443). She refused to answer any of these questions.

f. Answer to Petitioners' Evidentiary Argument.

In the face of this record, petitioners' studied efforts to ascribe innocent motives and objectives to Mrs. Walker serve only to obscure the real issue in the case. While, as petitioners state (Br. 15), Mrs. Walker did testify that she left her career as a lawyer and sought employment as a cannery worker, and subsequently as a label clerk, to "satisfy her longing to contribute significantly to labor's cause," the findings of the Arbitration Board make clear that the Board

did not believe her, but instead inferred that she took this unusual step in order to "more actively and more effectively carry on the program and activities of the Communist Party" (R. 440). The Board's findings also reflect its conclusion that Mrs. Walker was not acting from "idealistic aims" or because of "economic hardship" (Pet. Br. 15-16) but "from the point of view of the welfare of the working class and the strengthening of the Party" (Co. Exh. No. 6, *infra*, Appendix), as she expressed her attitude in her own words three months before she applied for employment at Cutter Laboratories.

Petitioners argue that "nothing in the proofs or even in any of the numerous questions put to Mrs. Walker related to her 'dedication' to or propensity for sabotage, etc." (Br. 17-18). No one at the hearing before the Arbitration Board, however, and least of all Mrs. Walker, had any doubt as to the full significance of respondent's questions concerning her activities on behalf of the Communist Party.

Mrs. Walker was notified when she was discharged that (R. 9-10):

> "The nature of our company's [respondent's] business requires more than the usual precaution against *sabotage and subversion*. Upon a disclosure that any employee is a member of the Communist Party, or has participated in *other subversive or revolutionary activity*, we conceive it to be the responsibility of management to take action."

The Arbitration Board acknowledged that it was the position of respondent throughout the hearing

that "the discharge in this case is based, not on suspicion of Communism, but upon specific, concrete, documented evidence of actual Communist Party membership and participation" and that "the evidence in this case demonstrates beyond question that Doris Walker is, not merely a conspirator, but a traitor and an enemy of her country" (R. 27). The Board correctly understood the questions asked of Mrs. Walker, which she refused to answer, as having been directed at establishing this position. It refused to instruct Mrs. Walker to answer, over respondent's protest, because it concluded that "Assuming her answers would have been favorable to the Company's position, they would serve no more than to corroborate what we find is already established by the record" (R. 29).

Respondent was not called upon to prove, or to offer to prove, that Mrs. Walker had actually committed an act of sabotage at respondent's plant (*Dennis v. United States* (1951) 341 U.S. 510-511, 564-565). As hereafter noted (*infra*, pp. 85-86), Mrs. Walker with other union officials was involved in 1947 in an effort to spoil respondent's product which an arbitrator subsequently ruled was not "legitimate strike activity", but even if respondent had not yet suffered sabotage of a display of violence, such circumstances would have been entirely consistent with Mrs. Walker's activities aimed at strengthening the Party. Respondent's executive vice president, in the passage omitted from the quotation of his testimony at page 20 of Petitioners' Brief, pointed the matter up when he said (R. 416):

"I think I have previously pointed out, Mr. Edises, that what we were afraid of was not work that would be done without Party orders but *what the Party orders might be and when.*"*

Further, Respondent was not called upon to prove, or to offer to prove, that Mrs. Walker had been convicted of a violation of the Smith Act or of the California Criminal Syndicalism Act or that she had confessed to any such violations. The matter at issue

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*What respondent had in mind was expressed by Mr. Justice Jackson, concurring in *Dennis v. United States* (1951) 341 U.S. 494, when he said (pp. 564-565):

"The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in transportation, communications, industry, government, and *especially in labor unions where it can compel employers to accept and retain its members.* It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion.

"The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. *Their strategy of stealth precludes premature or uncoordinated outbursts of violence, except of course, when the blame will be placed on shoulders other than their own.* They resort to violence as to truth, not as a principle but as an expedient. Force or violence, as they would resort to it, may never be necessary, because infiltration and deception may be enough.

Force would be utilized by the Communist Party not to destroy government but for its capture. The Communist recognizes that an established government in control of modern technology cannot be overthrown by force until it is about ready to fall of its own weight. *Concerted uprising, therefore, is to await that contingency and revolution is seen, not as a sudden episode, but as the consummation of a long process.*"

was Mrs. Walker's conduct, motives and objectives, and not the fact of her conviction or confession, and the Arbitration Board was free to determine, as it did, upon the basis of the evidence before it, that she was a member of the Communist Party with the full implications of dedication to "sabotage, force, violence and the like" (*Southern S. S. Co. v. National Labor Relations Board* (1942) 316 U. S. 31; *International Union U.A.W. v. Wisconsin Empl. Rel. Bd.* (1949) 336 U. S. 245, 260-263, n. 15; *National Labor Relations Board v. Kelco Corporation* (C.A. 4th, 1949) 178 F. (2d) 578, 580; *Maryland Drydock Co. v. National Labor Relations Board* (C. A. 4th, 1950) 183 F. (2d) 538, 540).

Petitioners' argument is not aided by the fact that "the Arbitrators, mature, experienced and responsible men, ordered the Company to take Mrs. Walker back into its employ" (Br. 28).

One of them, Mr. J. Paul St. Sure, dissented from the order, saying (R. 45):

> "The conclusion that an employer may not discharge an employee who is dedicated to 'sabotage, force, violence and the like' is shocking to me."

The other two, in explaining their award, made clear that they acted without regard to the issue of public policy, saying that the proof and arguments at the hearing "pose many issues of general public importance that seems to us to go beyond the scope of our legitimate authority or responsibility to decide" (R. 28).

Finally, petitioners can take no comfort from the fact that respondent, in its answer (R. 36-37) and through objections and proposed amendments to the findings of fact and conclusions of law of the trial court (R. 77-78), sought a judicial trial of its claim that Mrs. Walker was a dedicated member of the Communist Party and continued to be such even after the date of the arbitration award. One purpose of the pleadings was to meet the apparent requirements of the decision of the California Supreme Court in *Loving & Evans v. Blick* (1949) 33 Cal. (2d) 603, where the court had said (p. 614):

> "Under the authorities above cited it seems clear that when a party seeks to use the processes of the courts to obtain confirmation of an arbitrator's award, and an issue is raised concerning the alleged illegality of the contract upon which the award is based, *the trial court is the tribunal which must determine such issue of illegality upon the evidence presented to it.* If this were not the rule, courts would be compelled to stultify themselves by lending their aid to the enforcement of contracts which have been declared by statute to be illegal and void. *A party seeking confirmation cannot be permitted to rely upon the arbitrator's conclusion of legality for the reason that paramount considerations of public policy require that this vital issue be committed to the court's determination whenever judicial aid is sought.*"

Respondent had proved before the Arbitration Board that Mrs. Walker was a member of the Communist Party dedicated to that Party's program of "sabotage, force, violence and the like" and its plead-

activities (R. 31-32) is that had respondent acted in 1947, after its first investigation of her activities, its right to discharge Mrs. Walker on this ground would have been upheld.

The Board acknowledged that one of the reasons why respondent did not discharge Mrs. Walker in 1947 was "upon advice of counsel that the discharge would not 'stick'" for the reason that at that time "there was not sufficient evidence of Communist membership or affiliation" (R. 30).

The testimony on this point was direct and specific. The 1947 investigation had been made by a retail credit agency for a fee of six or seven dollars (R. 333). Respondent's executive vice-president testified concerning the report it submitted as follows (R. 307):

> "Q. [by Mr. Edises] With that report in your possession did you take any further steps toward investigating those matters?
>
> A. Yes. We called in our attorneys.
>
> Q. No. I am speaking about that time.
>
> A. Yes. I am saying that at or about that time we called in Mr. Johnson. We were seriously concerned with the implications in that report and we asked him, If we discharged Mrs. Walker, could we make it stand up? We did not, on advice of counsel, discharge Mrs. Walker because we had no material evidence beyond certain things which she had left off of her application blank and which would be, we feared, explained away. *We didn't want to be in the position of harassing a union officer and not be able to make the discharge stick.*"

As the court below pointed out (R. 471), the Union filed unfair labor practice charges against respondent as a result of the 1947 investigation. The effect of these charges was to deter respondent from pressing a more intensive investigation at that time. As respondent's executive vice-president testified (R. 308):

> "Further than that, she or the Union brought a charge of—
>
> Q. Unfair labor practice?
>
> A.—unfair labor practices before the NLRB. *And with no probability of our being able to get further material, we would just be feeding more material to the Party to claim that we were persecuting her.*"

The 1949 investigation was touched off by an article concerning Mrs. Walker in the issue of a union publication, the "Labor Herald," for August 23, 1949 (R. 181, 311, Co. Exh. No. 4), which reported as follows:

> "FTA also objects to the firing of Doris Walker from one of the canneries because she refused to answer the question, 'Are you a Communist?'
>
> The company claimed she was fired for political beliefs and the NLRB sustained the company, declaring there was a precedent for such action in a previous firing of another company in a different strike."

This investigation was made under the direction of respondent's attorney, who assembled a substantial amount of evidence concerning Mrs. Walker's Communist Party activities which was previously unknown

to respondent (R. 344-374, 377-394). This evidence included a description of the handwritten report to State headquarters of the Communist Party which is in evidence as Company Exhibit No. 6 (R. 388-390; *infra*, Appendix), and which the attorney said "could be available for any hearing that came up" (R. 389). Respondent discharged Mrs. Walker only after it had been advised by its attorney that Mrs. Walker's Communist Party membership and activities had been so completely developed and so thoroughly documented that they could be established by competent evidence which would stand up before an arbitrator or before the courts.

The Arbitration Board held that by waiting until it had uncovered concrete, documented proof of Communist Party membership and activity respondent had waived its conceded right to discharge Mrs. Walker on the ground of such membership and activity. Under this holding an employer who believes, or even merely suspects, that an employee is a member of the Communist Party engaged in strengthening the Party while in his employ must discharge the employee forthwith on the basis of this belief or suspicion, or run the risk of being foreclosed from such action at a later date, when the belief or suspicion has been confirmed by carefully marshalled evidence which will stand up in court.

As the court below pointed out (R. 488), the retention in one's employ of a member of the Communist Party dedicated to that Party's program of "sabotage, force, violence and the like" has grave implica-

tions for the operator of a defense plant. The majority of such employers, when faced with such a prospect, would act on belief or suspicion and take their chances before an arbitrator or the courts rather than risk having the employees gain a prescriptive right to remain in their employ. The result would be to subject many employees who are innocent of wrongdoing to the inconvenience and dislocation of discharges based upon suspicion, and to the necessity of proving their innocence, for the sole purpose of benefitting those few employees who are dedicated Communists and who can be proved to be such after a painstaking investigation.

SUMMARY OF ARGUMENT.

I.

Petitioners' entire brief is devoted to an effort to have this Court either (a) adopt an interpretation of the Arbitration Board's finding concerning Mrs. Walker's Communist Party membership and activities which would differ from the interpretation given the finding by the court below or (b) review and set aside the finding, as interpreted by the court below, on the ground that the finding is "entirely without evidentiary support" (Pet. Br. 6).

We contend, on the other hand, that under settled principles applicable to the review of the decisions of State courts, this Court should accept both (a) the interpretation given by the court below to this crucial finding and (b) the holding of the court be-

low that such finding is clearly supported by unchallenged and uncontradicted evidence.

The arbitration award comes to this Court with the gloss of the Supreme Court of California upon it, and this Court should accept that court's interpretation of the award as the basis for its own decision of the case, particularly since the interpretation is clearly a reasonable one. The crucial finding of fact made in the award also comes to this Court authenticated by the State of California speaking through its Supreme Court, and even if the finding were subject to the usual rules of court review, this Court could reject it only if the court could say that the finding is "so without warrant as to be a palpable evasion" of the constitutional guarantees invoked by petitioners. This, we submit, it cannot say.

There is the further circumstance that under California law the findings of fact of arbitrators are normally conclusive and nonreviewable. The Court below did not declare a different rule applicable to this case, but instead decided the case "upon the undisputed evidence and upon the facts found by the arbitration board" (R. 469, 489). For this reason, also, we submit that this Court is bound by the crucial finding of the Arbitration Board, as interpreted by the court below, and that it should not set the finding aside on evidentiary grounds.

II.

When the case is considered upon the basis of the crucial finding of the Arbitration Board, as inter-

preted by the court below, it is clear that petitioners have not been deprived of any constitutional rights by the refusal of the court below on grounds of public policy to permit the use of the process of the State courts to enforce an arbitration award directing the reinstatement to employment in a defense plant of a person found to be a member of the Communist Party dedicated to that Party's program of "sabotage, force, violence and the like."

Petitioners seek a statutory remedy which the California courts have held to be "in substance a suit in equity for specific performance." The court below held that (a) it was authorized to withhold this remedy if it found that the arbitration award was against public policy and (b) that the award was, in fact, against public policy.

It cannot be successfully contended that either of these holdings violates any right, privilege or immunity given petitioners by the United States Constitution.

The courts have universally held that their process cannot be used to enforce an arbitration award that is against public policy. This holding is founded upon the basic principle, recognized and applied by all courts, including this Court itself, that no court will enforce a contract or other transaction which is illegal or otherwise against public policy. The exercise of this inherent power by the courts has never been successfully challenged on constitutional grounds, and petitioners have cited no provision of the United States Constitution which would require that exer-

cise of the power be withheld for the benefit of a knowing and deliberately acting Communist.

This Court has held that without infringing any rights given by the United States Constitution a State may declare and apply a public policy which prohibits picketing to enforce a demand that an employer hire Negro clerks in proportion to his Negro customers, and a public policy which prohibits picketing of a self-employer's place of business for the purpose of compelling him to adopt a union shop. These policies, while important, cannot compare in significance with the policy declared and applied in this case by the court below, namely, that of protecting defense plants within the State against the danger of "sabotage, force, violence and the like" which would flow from the reinstatement of an employee who had been found by an Arbitration Board to be dedicated to such objectives. It follows, therefore, that the declaration and application of this latter policy does not infringe or deny any rights given by the United States Constitution.

This conclusion is confirmed by the fact that if this Court had the matter before it as one to be determined upon the basis of general equitable principles, it would withhold relief unless petitioners could show that they came with clean hands and that relief would be in the public interest. Since a knowing and deliberately acting Communist who desires reinstatement to employment in a defense plant in order to carry on more actively and more effectively the program of the Communist Party cannot show

ings served notice that it was prepared to prove the same fact in court, should the fact ultimately be held to be a matter for judicial determination. The pleadings also made clear, as the court below noted, that Mrs. Walker's Party membership and activities were "the studied and calculated choice of a person of some intellectual attainment" (R. 488) and that they were continuing and unchanged, so that if the court directed enforcement of the award it would do so with the knowledge that it was restoring to employment in a defense plant a Communist Party member who was *still* intent upon carrying on more effectively and actively the program and activities of that Party.

3. THE HOLDING OF THE ARBITRATION BOARD THAT RESPONDENT'S DELAY IN DISCHARGING MRS. WALKER WAIVED THE RIGHT IT WOULD OTHERWISE HAVE HAD TO DISCHARGE HER BECAUSE OF HER COMMUNIST PARTY MEMBERSHIP AND ACTIVITIES BENEFITS PROVEN, DEDICATED COMMUNISTS AT THE EXPENSE OF EMPLOYEES WHO ARE MERELY SUSPECTED OF PARTY MEMBERSHIP.

In their statement of the questions presented and of the case, and in the argument which follows, petitioners seek to establish that this cause involves the right of Communists to eat and to engage "in one of the ordinary vocations of life" (Br. 4). A correct analysis of the Arbitration Board's decision, however, demonstrates that no such issue is involved.

A necessary inference from the Board's holding that respondent had "waived" its right to discharge Mrs. Walker for her Communist Party membership and

that her hands are clean or that reinstatement is in the public interest, she can claim no constitutional right to reinstatement.

III.

A knowing and deliberately acting Communist cannot claim the right under any Federal statute to the aid of the process of a State court in securing reinstatement to employment in a defense plant.

The enactment by Congress of the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954 did not have the result of prohibiting a State from withholding the process of its courts from the enforcement of an arbitration award which directs the reemployment in a defense plant of a member of the Communist Party who is dedicated to that Party's program of sabotage, force, violence and the like.

The policy manifested by these Federal statutes was as binding upon the court below as the policy manifested by the State legislation which it cited. The court below, having determined that the arbitration award contravened this policy, was required by applicable decisions of this Court to withhold its process from the enforcement of the award. The jurisdiction of this Court to review and reverse the decision upon other than constitutional grounds (which do not exist, *supra*, pp. 25-27) depends upon whether any Federal statute gives Mrs. Walker an affirmative right to the aid of this process.

The Smith Act denounces as a crime the type of conduct which the crucial finding attributes to Mrs. Walker. Obviously, therefore, she can claim no affirmative rights under that Act.

The provisions and the legislative history of the Internal Security Act of 1950 and the Communist Control Act of 1954 likewise show that Congress considered Mrs. Walker's conduct to be criminal and to constitute "a clear and present danger to the security of the United States". It is apparent, therefore, that even though the provisions of these Acts applicable to defense facilities are not yet operative, the Acts cannot be construed as giving a knowing and deliberately acting Communist an affirmative right to reinstatement to employment in a defense plant.

Since Mrs. Walker cannot claim an affirmative right to reinstatement under these Federal statutes, a basic prerequisite for invoking the jurisdiction of this Court is lacking. Further, none of the questions raised in the petition for certiorari and argued in petitioners' brief fairly presents an issue as to the correctness of the holding concerning the public policy established by these statutes and the other statutes, executive messages and judicial decisions cited by the court below. Should this Court reach the merits of the holding, however, it would concur with the court below that, in view of the crucial finding, enforcement of the arbitration award would be against the public policy of the United States.

The foregoing argument presents respondent's position upon a correct view of the record as it comes

to this Court. Since the arguments advanced by petitioners are all based upon the hope that this Court will either interpret the crucial finding differently from the court below or set the finding aside as unsupported by evidence, the necessary answer to all of the arguments is that they are not supported by the record.

Respondent's answer to each argument in detail is as follows:

IV.

Answer to Point One: The court below did not apply a conclusive presumption that all Communists are dedicated to "sabotage, force, violence and the like".

The finding that Mrs. Walker was personally dedicated to "sabotage, force, violence and the like" was made by the Arbitration Board and not by the court below, and accordingly the court did not have occasion to apply a conclusive presumption concerning the Communist Party in the resolution of this issue of fact. The function which the court performed was to review the finding made by the Arbitration Board for the purpose of satisfying itself that the finding was supported by the evidence. In this review it properly concluded that the evidence amply justified the inference drawn by the Arbitration Board as to Mrs. Walker's personal dedication to the Communist Party program of "sabotage, force, violence and the like."

The court below did not promulgate a novel public policy or undertake to establish a "security risk" program. It merely exercised a power universally claimed by courts in this country, including this Court; namely, that of refusing to permit its process to be used to enforce a demand which is against public policy.

The court below did not deny petitioners or Mrs. Walker procedural due process. Mrs. Walker knew that her personal dedication to the Communist Party program was a material issue in the case because she was expressly told so by the Arbitration Board and she was expressly warned that if she remained silent in the face of the mass of incriminating evidence presented by respondent, the Board would draw all justifiable inferences from her silence. She had every opportunity to present a defense to respondent's charges but she deliberately refused to do so. She now has no standing to complain of the consequences of her deliberate choice.

V.

Answer to Point Two: The decision below did not deprive Mrs. Walker of a judicial trial or give effect to Federal and State statutes as legislative adjudications.

Mrs. Walker elected to present her case before the Arbitration Board and she was given a full opportunity to defend against respondent's charges at the hearings before the Board. As already noted, she deliberately declined to present any defense and by the

gravest misconduct, condoned by the Board, she deprived respondent of its right of cross-examination.

Mrs. Walker was later given an opportunity to have a judicial hearing on the crucial issue of her Communist Party membership and activities, when respondent pleaded such membership and activities as an affirmative defense to confirmation of the award, but petitioners blocked such a hearing.

In view of these circumstances neither petitioners nor Mrs. Walker have any standing to complain of the lack of a judicial trial of the charges.

Since the Arbitration Board had already found Mrs. Walker guilty of membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, the court below had no occasion to give effect to the findings of Congress concerning the Communist Party as legislative adjudications of Mrs. Walker's guilt. As the court's opinion makes clear, these findings were cited by it for the purpose of explaining the meaning of the term "full implications . . . of Party membership," as used in the crucial finding, and setting forth the evidence of the public policy which restrained the courts from enforcing an award containing such a finding.

VI.

Answer to Point Three: The court below did not declare a public policy which was not in existence when Mrs. Walker was discharged nor did it, by citing certain recently enacted statutes as evidence of public

policy, give those statutes the effect of laws impairing the obligation of petitioners' contract with respondent.

The public policy which the court below applied in this case was the policy which leads the courts to withhold their aid from those who would overthrow our Government by force and violence; namely, the policy against treason. This is not a new public policy, but is one that has existed since the inception of the Government.

The decision of the court below was based upon the general principles by which courts determine that a transaction is good or bad on principles of public policy and as such it presents no issue of impairment of any contractual obligation.

VII.

Answer to Point Four: This point, which relates to the effect to be given to the enactment of the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954, has already been answered under subdivision III of respondent's argument, summarized (*supra* at pp. 28-30).

VIII.

Answer to Point Five: The Labor Management Relations Act of 1947 does not give a knowing and deliberately acting Communist a right to be reinstated to employment in a defense plant.

The facts of this case present a striking example of a type of conduct which has given Congress grave

concern; namely, the abuse of the rights given and the processes provided by the Labor Management Relations Act for the purpose of compelling employers to retain active and dedicated Communists in strategic posts in industry.

Congress did not intend that the rights given by the Labor Management Relations Act be a shield for improper or illegal conduct, and neither this Court nor the National Labor Relations Board has construed them as such. A holding that Mrs. Walker's conduct, as found by the Arbitration Board, is protected by that Act would be inconsistent with the whole purpose of the Act and the other subsequent Federal Acts dealing with the Communist problem in industry.

Further, Mrs. Walker had a choice between proceeding under the Labor Management Relations Act or proceeding before the Arbitration Board, and having elected to proceed before the latter, she has waived any rights given by the Labor Management Relations Act.

IX.

Finally, the Federal questions asserted by petitioners were not raised in the courts below in a timely manner.

The court below upheld a defense which was asserted by respondent at the outset of its pleading in the trial court and urged at every subsequent stage of the litigation. Petitioners were bound to anticipate that the decision of the court below might be favorable to this

fornia. Insofar as concerns the rights of petitioners under the United States Constitution, however, the case as it comes to this Court presents the single question whether such rights have been infringed or denied by the determination that enforcement of the award should be refused because the award is contrary to the public policy of the State of California (*Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.* (1899) 175 U. S. 90, 100). The right to enforce compliance with the arbitration award is a state-created right and therefore the measure of the right is to be found only in the State law (*Ragan v. Merchants Transfer Co.* (1949) 337 U. S. 530, 533; *Guaranty Trust Co. v. York* (1945) 326 U. S. 99, 108; *cf., Holmberg v. Ambracht* (1946) 327 U. S. 392, 394).

In *Hughes v. Superior Court of California* (1950) 339 U. S. 460, this Court held that it was within the province of the State of California to declare and apply a public policy which prohibited picketing to enforce a demand that an employer hire Negro clerks in proportion to his Negro customers. At the same term, in *International Brotherhood of Teamsters v. Hauke* (1950) 339 U. S. 470, this Court held that it was within the province of the State of Washington to declare and apply a public policy which prohibited picketing of a self-employer's place of business for the purpose of compelling him to adopt a union shop.

While the policies which were upheld against constitutional attack in these two cases are important, they cannot compare in significance with the policy declared and applied by the court below, namely, that

defense, and accordingly they were obligated to raise the Federal questions alleged now to be implicit in such a decision at a stage prior to their petition for rehearing by the court below. Having failed to do so, they are foreclosed from urging the questions at this time as a basis for review by this Court.

ARGUMENT.

I.

UNDER SETTLED PRINCIPLES APPLICABLE TO THE REVIEW OF THE DECISIONS OF STATE COURTS, THIS COURT SHOULD ACCEPT BOTH (A) THE INTERPRETATION GIVEN BY THE COURT BELOW TO THE CRUCIAL FINDING OF THE ARBITRATION BOARD AND (B) THE HOLDING OF THE COURT BELOW THAT SUCH FINDING IS CLEARLY SUPPORTED BY UNCHALLENGED AND UNCONTRADICTED EVIDENCE.

As already stated, petitioners' entire argument is premised upon the hope that this Court will review and set aside the allegedly "erroneous" interpretation given by the court below to the finding concerning Mrs. Walker's Communist Party membership and activities or that it will reverse the holding that the finding, as so interpreted, is clearly supported by unchallenged and uncontradicted evidence. It is apparent from their brief that unless this hope is consummated, petitioners themselves concede that the judgment below must be affirmed.

Notwithstanding the crucial nature of these issues, petitioners have relegated their argument as to the precedents and legal basis for such a review to a foot-

of protecting defense plants within the state against the danger of "'sabotage, force, violence and the like" which would flow from the reinstatement of an employee who had been found by the Arbitration Board to be dedicated to such objectives (*Dennis v. United States* (1951) 341 U. S. 494, 509). With the crucial finding of the Arbitration Board outstanding against her, what possible constitutional right could Mrs. Walker, or petitioners, claim to the aid of a court of equity in securing reinstatement to employment in respondent's plant?

Certainly, in the face of such finding, and of the conclusion of the court below that Mrs. Walker's Party membership had been "persisted in on an active and devoted basis even at the board hearings" (R. 488), petitioners cannot be said to have come into court with clean hands. Therefore, if this Court had the matter before it as one for determination upon general equitable principles, it would give petitioners short shrift (*Precision Instr. Mfg. Co. v. Automotive M. Mach. Co.* (1945) 324 U. S. 806, 814; *Morton Salt Company v. G. S. Suppiger Company* (1942) 314 U. S. 488, 494; *B. B. Chemical Co. v. Ellis* (1942) 314 U. S. 495; *McMullen v. Hoffman* (1899) 174 U. S. 639, 656*; *Keystone Driller Company v. General Excavator Company* (1933) 290 U. S. 240, 244).

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*In *McMullen v. Hoffman*, cited in the text, this Court said (p. 656):

> "It is a maxim in our law that a plaintiff must show that he stands on fair ground when he calls on a court of justice to administer relief to him."

note (Br. 45-46, n. 13). None of the authorities cited in this footnote provides any precedent for the sweeping nature of the review sought by petitioners.

In *Kern-Limerick, Inc. v. Scurlock* (1954) 347 U.S. 110, 121, this court merely stated that it would not be bound by a state court's interpretation of a state statute where the right of the United States to immunity from state taxation was involved.

In *Feiner v. New York* (1951) 340 U.S. 315, this Court stated that it would make "an examination of the evidence to ascertain independently" whether a constitutional right had been violated, but that in such examination (p. 316):

> "Our appraisal of the facts is, therefore, based upon the uncontroverted facts and, where controversy exists, upon that testimony which the trial judge did reasonably conclude to be true."

This statement is consistent with the limitations upon the scope of its review which this Court has stated in cases hereafter cited.

In *Oyama v. California* (1948) 332 U. S. 633, this Court's examination of the record was for the purpose of showing that in the determination of the crucial facts the state court applied presumptions and inferences in a manner which discriminated against an American citizen of Japanese ancestry in violation of the Equal Protection Clause of the Fourteenth Amendment. No similar issue is involved in the instant case.

In *Norris v. Alabama* (1935) 294 U. S. 587, the uncontroverted facts related in the opinion of this Court led inevitably to the conclusion that Negroes had been systematically excluded from the juries which indicted and tried the defendant.

In *Truax v. Corrigan* (1921) 257 U. S. 312, this Court was concerned with a state court decision sustaining a demurrer to a complaint. There was no issue in that case as to the sufficiency of evidence to support a finding of fact.

In *Creswill v. Knights of Pythias* (1912) 225 U. S. 246, this Court reversed a finding by the state court that the plaintiff had not been guilty of laches on the ground that the undisputed facts compelled the legal conclusion of laches.

None of these cases, which are the only ones cited by petitioners in support of their argument, supports the position that this Court will substitute its interpretation of an arbitration award for a reasonable interpretation given to the award by the state court, or that it will make an independent evaluation of the evidence before the Arbitration Board in order to overturn a finding of fact by the Board which has been authenticated by the State of California speaking through its supreme court.

Concerning the first of these positions, it is clear that the decision of the court below was based upon its interpretation of the arbitration award. Accordingly, the award comes to this Court "with the gloss of the Supreme Court of [California] upon it"

(*Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board* (1942) 315 U. S. 437, 441; *International Brotherhood of Teamsters v. Hanke* (1950) 339 U. S. 470, 480). To treat with the award in any other way, as pointed out in the *Hanke* case, would be "to deal with a case that is not here and was not before the [California] court." (To the same effect, see: *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942) 315 U. S. 740, 747; *Auto Workers v. Wisconsin Employment Relations Board* (1949) 336 U. S. 245, 251). Further, even if this Court were to consider the matter of the interpretation of the award independently, it would accept the judgment of the California court concerning such matter "unless manifestly wrong" (*Rapid Transit Corp. v. New York* (1938) 303 U. S. 573, 593; *Dodge v. Board of Education* (1937) 302 U. S. 74, 79; *Hale v. State Board* (1937) 302 U. S. 95, 101, and cases there cited.)

Concerning the second of these positions, this Court has made clear that its power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded does not mean that it "will re-examine, as a court of first instance, findings of fact supported by substantial evidence" (*Norton Co. v. Department of Revenue of Illinois* (1951) 340 U. S. 534, 538). The finding of the Arbitration Board concerning Mrs. Walker's Communist Party membership and activity comes to this Court authenticated by the State of California, speak-

ing through its Supreme Court, and even if the finding were subject to the usual rules of court review, this Court could reject it "only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked" (*Milk Wagon Drivers Union v. Meadowmoor Co.* (1941) 312 U. S. 287, 294; see, also *Gallegos v. Nebraska* (1951) 342 U. S. 55, 61; *Watts v. Indiana* (1949) 338 U. S. 49, 53; *Lyons v. Oklahoma* (1944) 322 U. S. 596, 602; *Lisenba v. California* (1941) 314 U. S. 219, 238).

There is the further circumstance in this case that the finding is not subject to the usual rules of court review. Petitioners argued throughout the proceedings below, and argue before this Court, that the findings of fact of the Arbitration Board are "conclusive and non-reviewable" (Br. 6). The court below did not declare any different view of the California law but decided the case "upon the undisputed evidence and upon the facts found by the arbitration board" (R. 469, 489).

It is clear, however, that under the California law the findings of fact of the Arbitration Board cannot be conclusive to the extent that petitioners like them and subject at the same time to being set aside to the extent that they foreclose or embarrass petitioners' arguments. Petitioners must accept the bitter with the sweet, and make their arguments upon the basis of the facts as found by the Arbitration Board rather than as petitioners would have this Court revise them.

This, significantly, petitioners have not done. Repeatedly throughout their brief they refer to the finding that Mrs. Walker was personally dedicated to "sabotage, force, violence and the like" as entirely without evidentiary support. (Br. 6, 17-18, 23, 30, 33, 37, 45, 53, 59-60, 64, 67, 70-71.)

We have already brought to the Court's attention the mass of documentary and other evidence which the court below held was clearly sufficient to support this crucial finding (*supra*, pp. 9-14). For the reasons we have stated (*supra*, pp. 38-39), we assume that this Court will not undertake to re-examine this evidence as if it were an appellate court of first instance. We are confident, however, that if such evidence were re-examined, this Court would conclude, as did the court below, that the evidence and the inferences properly to be drawn therefrom amply support the finding.

Petitioners lay great stress upon their claim that none of "the numerous questions put to Mrs. Walker related to her 'dedication' to or propensity for sabotage, etc." (Br. 17-18, 23). We have shown that all concerned, including Mrs. Walker, clearly understood that when respondent questioned Mrs. Walker concerning her Communist Party membership and activities it meant to, and did, refer to such membership and activity "with the full implications of dedication to sabotage, force, violence and the like" (*supra*, pp. 15-16). If there were any possibility of a misunderstanding, however, neither petitioners nor Mrs. Walker have any standing to complain, since the occasion for such

misunderstanding was created by their own misconduct.

Mrs. Walker refused to answer the questions asked of her, which the Arbitration Board had ruled to be material, on the ground that they were "an absolutely unwarranted invasion into my private beliefs" (R. 161; *supra*, p. 7). This was not a valid reason for refusing to answer, and as a material witness and an interested party who had testified on her own behalf in the arbitration proceedings, Mrs. Walker was under a duty to give her testimony fully, truthfully and without reservation (*Ullman v. United States* (1956) ... U. S. ..., 24 L.W. 4147, 4152; *United States v. Bryan* (1950) 339 U. S. 323, 331; Calif. Code Civ. Proc., secs. 2064-2065; see *infra*, pp. 77-78). Her refusal to submit to cross-examination denied respondent one of its most valuable rights (*Alford v. United States* (1931) 282 U. S. 687, 691)* and she should not be permitted to profit from her misconduct before this Court.

Since the arguments advanced by petitioners are all based upon the assumption that this Court will either interpret the crucial finding differently from

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*In *Alford v. United States*, cited in the text, this Court said (p. 693):

> "Counsel often cannot know in advance what pertinent facts may be elicited upon cross-examination. For that reason it is necessarily exploratory, and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

the court below or set the finding aside as unsupported by evidence, the necessary answer to all of the arguments is that they are not supported by the record. Before treating with each argument in detail, however, we will state affirmatively the reasons why the decision below does not deprive petitioners of any right under the Constitution of the United States and why the decision is not in conflict with any Federal Statute.

II.

PETITIONERS HAVE NOT BEEN DEPRIVED OF ANY CONSTITUTIONAL RIGHTS BY THE REFUSAL OF THE COURT BELOW ON GROUNDS OF PUBLIC POLICY TO PERMIT THE USE OF THE PROCESSES OF THE STATE COURTS TO ENFORCE AN ARBITRATION AWARD DIRECTING THE REINSTATEMENT TO EMPLOYMENT IN A DEFENSE PLANT OF A PERSON FOUND TO BE A MEMBER OF THE COMMUNIST PARTY DEDICATED TO THAT PARTY'S PROGRAM OF "SABOTAGE, FORCE, VIOLENCE AND THE LIKE".

An analysis of the constitutional aspects of this case must take into account the precise nature of the proceedings in the courts below.

Petitioners' action was brought pursuant to the authority of section 1287 of the California Code of Civil Procedure, which provides a statutory procedure for the enforcement of arbitration awards. This procedure has been held to have superseded and abolished the doctrines theretofore applicable to common law arbitrations in California (*Crofoot v. Blair Holdings Corp.* (1953) 119 Cal. App. (2d) 156, 182).

vocates, abets, advises or teaches the . . . overthrowing or destroying the Government of the United States or . . . of any State . . . by force or violence" or who "organizes or helps or attempts to organize any society, group or assembly of persons who . . . encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such . . . assembly of persons, knowing the purposes thereof" is guilty of a crime. As also noted by the court below (R. 483), the crucial finding of the Arbitration Board brought Mrs. Walker's conduct precisely within the prohibitions of this Act and the parallel California Criminal Syndicalism Act (Cal. Pen. Code, secs. 11400-11402).

No decision of this Court has gone so far as to hold that the enactment of a penal statute has in any situation superseded or abrogated the universally established rule governing the courts in this country, both State and Federal, that any contract or other transaction in violation of such statute is void and unenforceable. To the contrary this Court has held affirmatively that State courts have no power to enforce contracts which contravene Federal statutes (*Anderson v. Carkins* (1890) 135 U. S. 483, 489; *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 483; *cf. Sola Elec. Co. v. Jefferson Elec. Co.* (1942) 317 U. S. 173, 176; *Three Star Food Products Corporation v. Ofsa* (1923) 94 W. Va. 636, 119 S. E. 859, 29 A.L.R. 1053). We submit, therefore, that the enactment of the Smith Act cannot be construed as

The California Supreme Court has held that the statutory procedure to enforce arbitration, "although in form a special proceeding, is in substance a suit in equity for specific performance of a contract to arbitrate" (*Trubowitch v. Riverbank Canning Co.* (1947) 30 Cal. (2d) 335, 347). In *Levy v. Superior Court* (1940) 15 Cal. (2d) 692, the court said concerning the procedure for the enforcement of the award (p. 700):

> "'Broadly speaking, specific performance will be enforced *only when the thing ordered by the award to be done is such as a court of equity would specifically enforce if it had been agreed upon by the parties themselves.*'"

Following its own precedents (*Loving & Evans v. Blick* (1949) 33 Cal. (2d) 603; *Franklin v. Nat C. Goldstone Agency* (1949) 33 Cal. (2d) 628, 630-633), the court below held (1) that it had authority under the statute to set aside an arbitration award if the award was against public policy (R. 479-480)* and (2) that the award then before it violated public policy by directing that a member of the Communist Party dedicated to that Party's program of sabotage, force, violence and the like be reinstated to employment in a defense plant (R. 480-490).

No possible constitutional argument could be based upon the first branch of this holding. The courts have

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*Since 1872 section 1667 of the California Civil Code has provided:

"That is not lawful which is:

1. Contrary to an express provision of law;
2. **Contrary to the policy of express law, though not expressly prohibited**; or,
3. Otherwise contrary to good morals."

evidencing an intention upon the part of Congress to prohibit a State court from refusing the aid of its process to assist a knowing and dedicated Communist to regain employment in respondent's plant to carry on more actively and effectively the Communist Party program of "sabotage, force, violence and the like" in violation of the penal sanctions of the Act.

The enactment by Congress on September 23, 1950, of the Internal Security Act of that year did not evidence any intention to give a knowing and deliberately acting Communist an affirmative right to reinstatement to employment in a defense plant. By Section 2 of that Act (which the court below quoted, R. 480-481) Congress made detailed findings as to the existence and objectives of the Communist movement which demonstrate that, in its judgment, the activities of persons dedicated to that movement present "a clear and present danger to the security of the United States." The Act provides, in section 5 (1) (D), that it shall be unlawful for any member of a Communist-action organization, with knowledge or notice that such organization is registered as such under the Act, "to engage in any employment in any defense facility." This provision is not yet effective, since the elaborate administrative procedures required for its implementation have not been completed, but the entire tenor of the Act is such as to make clear that Congress did not intend that, pending implementation of the provision, knowing and deliberately acting Communists should have an affirmative right under the Act to reinstatement to employment in a defense plant.

universally held that private parties cannot breathe life into an illegal transaction through the process of arbitration or call upon the courts to lend their process to the enforcement of awards which are against public policy (*Aubert v. Maze* (1801) 2 Bus. & Pul. 371, 126 English Reprint 1333; *Maybin v. Coulon* (1804) 4 Dall. (Pa.) 298; *Fain v. Headrick* (1867) 44 Tenn. 327; *Hale v. Sharp* (1866) 44 Tenn. 275; *Benton v. Singleton* (1902) 114 Ga. 548, 40 S.E. 811, 58 L.R.A. 181; *Hall v. Kimmer* (1886) 61 Mich. 269, 28 N.W. 96, 1 Am. St. Rep. 575; *Polk v. Cleveland Ry. Co.* (1925) 20 Ohio App. 317, 151 N.E. 808, 811; *Tandy v. Elmore-Cooper Live Stock Commission Co.* (1905) 113 Mo. App. 409, 87 S.W. 614, 618; *Smith v. Gladney* (1936) 128 Tex. 354, 98 S.W. (2d) 351; *Western Union Tel. Co. v. American Communications Ass'n* (1949) 299 N.Y. 177, 86 N.E. (2d) 162, 167; *Publishers Ass'n v. Newspaper & Mail Del. Union* (1952) 280 App. Div. 500, 114 N.Y.S. (2d) 401). The principle declared in these decisions has been recognized and applied in the Federal courts (*Pittsburgh Const. Co. v. West Side Belt R. Co.* (C. C. Pa. 1907) 151 Fed. 125, 130, *aff'd*, (C.C.A. 3rd 1907) 154 Fed. 949) and there is every reason to believe that it would be applied by this Court should an appropriate case come before it (compare *Paramount Famous Lasky Corp. v. United States* (1930) 282 U. S. 30, 43; *Wilko v. Swan* (1953) 346 U.S. 427, 434, 440). The principle is now so generally recognized that Section 12 of the Uniform Arbitration Act adopted by the National Conference of Commissioners on Uniform State Laws on August 20, 1955 (Handbook of the National Conference of Com-

The foregoing conclusion is confirmed by the legislative history of the Act. In House Report No. 2980, 81st Cong., 2d Sess., the Committee on Un-American Activities of the House of Representatives reported concerning the Act as follows (U. S. Code Cong. Serv., 1950, pp. 3888-3889, 3891):

> "A careful analysis of the strategy and tactics of communism in the United States discloses activities by reason of which the committee has concluded that legislation can and should be directed toward—
>
> * * * * * * *
>
> (5) Making it unlawful for a member of any Communist organization, in seeking, accepting, or holding employment in any defense plant, to conceal the fact that he is a member of such organization, or **to engage in any employment in a defense plant.**
>
> * * * * * * *
>
> CONCLUSION
>
> The committee wishes to emphasize that this legislation alone is not a complete answer to the Communist problem in the United States. **An attack must be made upon the Communist problem on all fronts if we are to meet it successfully.**"

The enactment on August 24, 1954, of the last of the pertinent Acts, namely, the Communist Control Act of 1954 (68 Stats. 775; 50 U.S.C. (1955 Supp.), secs. 841 *et seq.*), did not evidence any intention to grant the right here claimed.

missioners on Uniform State Laws, 1955, pp. 132, 162, 166), provides that the court shall vacate an arbitration award where

> "(3) The arbitrators exceeded their powers *or rendered an award contrary to public policy.*"

With regard to the second branch of the holding of the court below, the determination that the award was against public policy was based upon a review of pertinent statutes, State and Federal, the President's message to Congress of January 7, 1954, and numerous decisions of Federal and California courts (R. 480-490). These are the same sources to which this Court has turned in striking down private agreements or other arrangements on grounds of public policy (*Hurd v. Hodge* (1948) 334 U. S. 24, 34-35*; compare, *Vidal v. Girard's Executor* (1844) 43 U. S. 126, 197; *Building Service E. I. U. v. Gazzam* (1950) 339 U. S. 532, 537-538).

As will be hereafter shown (*infra,* pp. 63-65), if this Court were to consider the matter as one for its independent determination, it would unquestionably agree with the court below that enforcement of the award would be against the public policy of the United States as well as of the State of Cali-

*In *Hurd v. Hodge*, cited in the text, this Court said (pp. 34-35):

> "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States *as manifested in the Constitution, treaties, federal statutes and applicable legal precedents.* Where the enforcement of private agreements would be violative of that policy, it is the obligation of the courts to refrain from such exertions of judicial power."

In section 2 of that Act, quoted by the court below (R. 482-483), Congress directed its findings specifically at the Communist Party, declaring in part:

> "The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed."

By section 3 of the Act Congress proscribed the Communist Party of the United States and by Section 4 it made anyone who knowingly or wilfully becomes or remains a member of that Party subject to all of the provisions and penalties of the Internal Security Act of 1950. Section 7 established a new category of "Communist-infiltrated organizations," and Section 13A provided for an administrative determination of the status of an organization as a "Communist-infiltrated organization" and deprived such an organiza-

tion of designated rights under the National Labor Relations Act, as amended (29 U.S.C., secs. 150 *et seq.*).

In reporting favorably on this legislation (S. Rep. 1709, 83rd Cong. 2d Sess.) the Senate Committee on the Judiciary said (U. S. Code Cong. Serv., 1954, p. 3146):

> "The foregoing studies and investigations reveal these facts: (1) There are powerful Communist-controlled organizations masquerading as labor organizations which have bargaining rights for large segments of organized labor; (2) the loyal rank-and-file members of such Communist-controlled organizations have neither the security information available nor the facilities for ousting the Communist leadership or neutralizing the Communist influence; (3) such Communist-controlled organizations do not come within the definition of either a Communist-action organization or a Communist-front organization as used in the Subversive Activities Control Act of 1950; and (4) the foregoing situation constitutes a serious danger to the security of this Nation."

The cited provisions and legislative history of the Communist Control Act make clear that in the eyes of Congress the type of conduct in which Mrs. Walker was engaged, as found by the Arbitration Board, constituted a clear and present danger to the security of the United States. The fact that, *for the protection of innocent persons,* the provisions of the Act require further implementation before they become fully effective cannot be construed as evidencing an intention

that, pending such implementation, the persons whose activities made the legislation necessary should have an affirmative right to the aid of the courts in being restored to the employment which alone would make it possible for them to engage in the activities that the Act denounces.

Finally, the fact that Congress has not yet been able to devise more stringent legislation in this field to protect defense facilities from the activities of knowing and dedicated Communists, without limiting the constitutional rights of innocent persons, cannot be construed as recognizing the right of a knowing and dedicated Communist, specifically identified and proved to be such, to the aid of the courts in securing reinstatement to employment in a defense plant.

While the Senate and the House of Representatives could not agree on such legislation in 1954, the Senate Committee which reported favorably on the legislation (S. Rep. 1818, 83rd Cong. 2d Sess., on S3428) said (p. 2):

> "The purpose of the proposed bill [S 3428] is to provide the Federal Government with new authority to guard strategic defense facilities by barring from them that limited number of individuals who are subversive and may be reasonably believed to be disposed to commit acts of sabotage, espionage or other subversion. It is understood that a definite number of such individuals has already been identified. **Some of these individuals are known to be employed in facilities where sabotage in time of war or emergency would seriously impair the military effectiveness of the United States.**

In *Precision Instr. Mfg. Co., v. Automotive M. Mach. Co., supra,* this Court said (pp. 814-815):

> "The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. *It is a self-imposed ordinance that closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.*
>
> * * * * * * *
>
> Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. *For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.*"

The above-quoted statement of this Court is directly pertinent to the position of petitioners in this proceeding, and is persuasive that if petitioners had been able to apply in the first instance to the Federal courts for the relief which they seek, such relief would have been denied. In these circumstances, the denial of relief by the state courts cannot conceivably present any question of violation of a constitutionally protected right.

Petitioners have silently conceded the accuracy of this conclusion in their brief. They make no argument that if the crucial finding of the Arbitration Board is permitted to stand, they are nevertheless entitled

to relief from this Court. Their entire argument is premised upon the hope that this finding will either be ignored or set aside. For reasons already stated (*supra*, pp. 35-42), we submit that settled principles governing the review by this Court of state court decisions preclude any such action.

III.

THE ENACTMENT BY CONGRESS OF THE SMITH ACT, THE INTERNAL SECURITY ACT OF 1950 AND THE COMMUNIST CONTROL ACT OF 1954 DID NOT HAVE THE RESULT OF PROHIBITING A STATE FROM WITHHOLDING THE PROCESS OF ITS COURTS FROM THE ENFORCEMENT OF AN ARBITRATION AWARD WHICH DIRECTS THE REEMPLOYMENT IN A DEFENSE PLANT OF A MEMBER OF THE COMMUNIST PARTY WHO IS DEDICATED TO THAT PARTY'S PROGRAM OF SABOTAGE, FORCE, VIOLENCE AND THE LIKE.

A. The court below had the right to withhold its process from the enforcement of the arbitration award in the absence of a provision of the United States Constitution or of a Federal statute giving petitioners an affirmative right to the aid of such process.

As we have shown (*supra*, pp. 43-45), the court below, in construing and applying a State statute, merely exercised a power which has been universally recognized as inhering in a court of equity, namely, the power to withhold the process of the court from the enforcement of an arbitration award found to be against public policy.

The fact that the public policy involved was manifested in part by Acts of Congress and decisions of this Court and lower Federal courts does not affect

the power of the court below over its own process or alter the basic principle which governed its action.

The court below was bound as much by the policy manifested by the Acts of Congress it cited as by the policy manifested by the State acts which it also cited (*Testa v. Katt* (1947) 330 U.S. 386, 393). This is exemplified by the fact that in many of the cases which established the principle, now formally accepted and approved by the Commissioners on Uniform State Laws, that the State courts will not enforce an arbitration award which is illegal or against public policy, the laws and public policy involved were those of the United States (*supra*, p. 44).

In *Coulon v. Maybin* (1804) 4 Dall. (Pa.) 298, in setting aside a report of referees favorable to the plaintiff, the Supreme Court of Pennsylvania said (pp. 299-300):

> "There is a just debt due from the defendant Coulon, to the plaintiff, Maybin; and therefore, so far as the court could lawfully act, they would be desirous to affirm the report of the referees.
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> * * * * * * *
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> "The positive provisions of the laws of the United States, respecting American registered vessels; the national policy of our navigating system; good faith towards the belligerent powers; and the very foundations of morality; have been violated in the course of the transaction, now exhibited to us. The act of the court is necessary to give effect to the report of the referees; but no court of justice of the United States can lend its aid, at any time, or in any degree, to recover a debt originating in a source

so forbidden, so foul and so pernicious. The report cannot, therefore, be affirmed."

In *Hale v. Sharp* (1866) 44 Tenn. 275, 282, quoted *infra*, pp. 81-83, and *Fain v. Headerick* (1867) 44 Tenn. 327, involving arbitration awards which grew out of transactions with Confederate money, the Supreme Court of Tennessee set aside the awards on the ground that they violated the law and the public policy of the United States.

In *Hall v. Kimmer* (1886) 61 Mich. 269, 28 N. W. 96, 1 Am. St. Rep. 575, the Supreme Court of Michigan held that an arbitration award was void because it arose out of a transaction which violated an Act of Congress prohibiting an agent from charging more than $10 for services in procuring a pension for a veteran.

In *Tandy v. Elmore-Cooper Live Stock Commission Co.* (1905) 113 Mo. App. 409, 87 S. W. 614, the Kansas City Court of Appeals held that an arbitration award was void because it arose out of a transaction which violated an Act of Congress prohibiting the unlawful occupancy of public land, saying (87 S. W. 616):

"We are required to give to the Statutes of the United States the same recognition, force, and effect accorded to those of this state."

In *Western Union Tel. Co. v. American Communications Ass'n.* (1949) 299 N. Y. 177, 86 N. E. (2d) 162, the Court of Appeals of New York ordered that an arbitration award be vacated on the ground that

the award sanctioned a violation of both Federal and State law, saying (86 N. E. (2d) 168):

> "It is difficult to understand how Western Union can discharge those duties required of it by both Federal and State statutes if it is also required to *retain* in its service employees whose duty it is to transmit telegraph messages but who refuse to handle messages offered by the public which happen to be routed over facilities of a telegraph company where a strike prevails. To approve such a practice would to that extent oust the employer company from control of its own business and to that extent would prevent it from performing duties to the public required by law" (Emphasis by the court).

Since petitioners had invoked the process of the State courts and the benefit of a State statute, it was for the court below to say whether such process would be made available to them. That court had sole control over its process, at least initially (*cf.* 28 U.S.C., sec. 2283; *Amalgamated C.W. of A. v. Richman Bros.* (1955) 348 U. S. 511, considered *infra* p. 61), and the jurisdiction of this Court to review the decision below concerning the withholding of such process depends upon the existence of a "right, privilege or immunity . . . claimed under the Constitution . . . or statutes of . . . the United States" (28 U.S.C., sec. 1257(3)). In the absence of a showing by petitioners that the Constitution of the United States or a Federal statute gives them an affirmative right to the aid of such process, the decision of the court below to withhold the process should be final

(28 U.S.C., sec. 1257(3); *Milk Drivers Union v. Meadowmoor Co.* (1941) 312 U. S. 287, 292; *Greenough v. Tax Assessors* (1947) 331 U. S. 486, 497).

We have already demonstrated that a member of the Communist Party dedicated to that Party's program of "sabotage, force, violence and the like" does not have a *constitutional* right to reinstatement to employment in a defense plant (*supra*, pp. 42-49). It is equally clear that the enactment by Congress of the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954 did not give such Communist Party member a *statutory* right to reinstatement.

B. The enactment of the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954 did not give a member of the Communist Party dedicated to that Party's program of "sabotage, force, violence and the like" a statutory right to reinstatement to employment in a defense plant.

Mrs. Walker was discharged on October 6, 1949 (R. 7) and the arbitration award was issued on September 16, 1950 (R. 5). The Internal Security Act of 1950 was enacted on September 23, 1950 (64 Stat. 987; 50 U.S.C., sec. 1781 et seq.). Accordingly, on the dates of the discharge and of the award, the Smith Act was the only one of the Federal statutes listed in the heading which was in effect.

As noted by the court below (R. 481-482), the Smith Act (62 Stats. 808; 18 U.S.C., sec. 2385) provides that anyone who "knowingly or wilfully ad-

> "The facilities involved are privately owned and are primarily engaged in what is regarded as normal civilian production. Although there is authority for barring subversive individuals from facilities directly engaged in the performance of defense contracts, there is no similar authority with respect to these facilities, although, as in the case of a power-plant or a producer of other basic materials or supplies required by a defense contractor, sabotage or interruption of production by these facilities could very materially curtail defense production. Espionage is also an important consideration."

Clearly, it is not possible to spell out from this legislation and projected legislation any intent that a knowing and dedicated Communist have an affirmative right to the aid of the courts in securing reinstatement to employment in a defense plant, pending such time as the provisions which are directed in specific terms against such employment become operative. Neither is it possible to divine from such legislation an intent to abrogate, in this field alone, the settled rule that no court, either State or Federal, will enforce a contract or transaction which is "contrary to an express provision of law" or "contrary to the policy of express law, though not expressly prohibited" (see Cal. Civ. Code, sec. 1667, quoted *supra*, p. 43).

None of the cases decided by this Court under the Supremacy Clause of the United States Constitution furnishes any authority for such a result.

In *Commonwealth of Pennsylvania v. Nelson* (1956) ..... U.S. ....., 24 L. W. 4165, this Court was careful to state that all that was before it for review was

whether the Smith Act superseded the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct. In reaching an affirmative answer to this question it emphasized that the enforcement of State sedition acts presented a serious danger of conflict with the administration of the Federal program.

In the case now before this Court the exact reverse is true. The enforcement by the court below of an arbitration award which calls, in express terms, for a violation of the Smith Act, and directs the continuance of the type of activity which the Internal Security Act of 1950 and the Communist Control Act of 1954 were intended to proscribe, could serve no purpose other than to defeat the objectives and policy of these Acts. Initially, at least, the State courts alone have control over their own process (28 U.S.C., sec. 2283) and unless they are permitted to stay their hands, the only protection against contracts or other transactions subverting the policy of the Federal Acts would rest on an appeal to this Court (*Amalgamated C.W. of A. v. Richman Bros.* (1955) 348 U. S. 511).

All of the cases cited by this Court in the *Nelson* case (*Hines v. Davidowitz* (1941) 312 U. S. 52; *Rice v. Santa Fe Elevator Corp.* (1947) 331 U. S. 218; *Charleston & W. C.R. Co. v. Varnville Furniture Co.* (1915) 237 U. S. 597) involved State regulatory statutes which either presently or potentially conflicted with the provisions or policies of Federal Acts. Hence none of them is pertinent to the decision of this case.

Decisions which are pertinent, however, are those in the field of labor-management relations which rec-

ognize that the fact that Congress has legislated in a particular field within its competence does not mean that all conduct in the field not expressly proscribed by Congress is thereby made proper and beyond State control. In *Allen-Bradley Local v. Wisconsin Empl. Rel. Bd.* (1942) 315 U. S. 740, 750, and *International Union, UAW v. Wisconsin Empl. Rel. Bd.* (1949) 336 U. S. 245, 260, 264, this Court held that the protection given by the National Labor Relations Act, as amended, to the right of employees to engage in concerted activities and to strike did not give such employees the affirmative right to engage in violence or other improper or illegal conduct. So, in this case, even it could be claimed that none of the pertinent Federal Acts expressly forbids the reinstatement into employment in a defense plant of a knowing and deliberately acting Communist, the provisions and history of the Acts make crystal clear that none of them alone, nor any of them in combination, gives such a person an affirmative right to reinstatement.

As this Court pointed out in the *International Union, U.A.W.* case, a decision that an employee has a statutory right to reinstatement means that private employers are disabled from any kind of self-help to cope with the employee's conduct. The court below refused to read any such sweeping purpose into the legislation of Congress dealing with the Communist problem (R. 488-489) and we submit that its refusal was clearly right. Congress has moved slowly and with deliberation in this field, because of its desire not to infringe upon the constitutional rights of individ-

uals. It has nevertheless declared that the activities of knowing and dedicated Communists present "a clear, present and continuing danger to the security of the United States" (*supra*, p. 57), and the steps it has taken to cope with this danger cannot be construed as disabling private employers from taking protective action against employees whom they can prove to be knowing and active participants in the Communist program.

C. If this Court were to consider the matter independently of the decision below, it would reach the same conclusion, namely, that an arbitration award which directs that a member of the Communist Party who is dedicated to that Party's program of "sabotage, force, violence and the like" be reinstated to employment in a defense plant is against public policy and void and should not be enforced by the courts.

In the posture of the case as it reaches this Court, we question whether the holding below concerning the public policy of the United States is before it for review. We have shown that a knowing and deliberately acting Communist has no right under the Constitution or statutes of the United States to reinstatement in a defense plant and therefore that a basic prerequisite for invoking the jurisdiction of this Court is lacking (*supra*, pp. 42-62). Further, none of the questions raised in the petition for certiorari and argued in petitioner's brief fairly presents an issue as to the correctness of the holding. The only question that bears on the matter is question (6), which is limited to the issue (already answered, *supra* pp. 54-55) as to whether the doctrine of Federal supersession abrogates the principle that State courts will not lend

their process to the enforcement of contracts or other transactions which contravene the policy of Federal laws.

Should this Court reach the merits of the holding below, however, we are confident that it will concur in such holding.

Under the facts as found by the Arbitration Board, Mrs. Walker and her co-conspirators were engaged in the precise conduct which Justice Jackson envisaged in his concurring opinion in *Dennis v. United States* (1951) 341 U. S. 494, when he said of the Communist Party (p. 564): "It seeks members that are, or may be secreted in strategic posts in . . . industry . . . and especially in labor unions where it can compel employers to accept and retain its members." It was this conduct, multiplied throughout the country, which led to the enactment of the non-Communist affidavit provision of the Labor Management Relations Act of 1947 (see *American Communications Ass'n, C. I. O. v. Douds* (1950) 339 U. S. 382, 389), and the provisions of the Internal Security Act of 1950 and the Communist Control Act of 1954 already noted (*supra*, pp. 55-59), and which caused Congress to consider even more drastic legislation (*supra*, 59-60).

Mrs. Walker's conduct, and the arbitration award which seeks to compel respondent to reinstate and retain her in its employ notwithstanding such conduct, are clearly contrary to the policy of these Acts, as well as of the Smith Act, and call for the application not only of the principle that this Court will not enforce an agreement or transaction which is against the pub-

lic policy of the United States (*Hurd v. Hodge* (1948) 334 U. S. 24, 34-35, and other authorities cited *supra*, p. 45) but also of the broader equitable principle that specific enforcement of even a valid contract will be denied where such enforcement would be against the public interest (*Beasley v. Texas & P. R. Co.* (1903) 191 U. S. 492, 497; *Mercoid Corp. v. Mid-Continental Invest. Co.* (1944) 320 U. S. 661, 670).

IV.

ANSWER TO POINT ONE: THE COURT BELOW DID NOT APPLY A CONCLUSIVE PRESUMPTION THAT ALL COMMUNISTS ARE DEDICATED TO "SABOTAGE, FORCE, VIOLENCE AND THE LIKE".

A. The finding that Mrs. Walker was personally dedicated to "sabotage, force, violence and the like" was made by the Arbitration Board, and not by the court below, and was amply supported by the evidence and the justifiable inferences to be drawn from such evidence.

The court below did not make the finding that Mrs. Walker was a member of the Communist Party "with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail." The Arbitration Board made this finding, based upon the testimony and other evidence before it and upon the inferences which it could justifiably draw from such testimony and evidence.

It was the Arbitration Board, not the court, that heard Mrs. Walker testify, observed her demeanor when confronted with her handwritten report to the State Headquarters of the Communist Party (Co.

"The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. **There is sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness.** We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify."

Respondent had a right to cross-examine Mrs. Walker (*Alford v. United States* (1931) 282 U. S. 687, 691) and she was under a duty to submit to such cross-examination (*Ullman v. United States* (1956) ..... U. S. ....., 24 L.W. 4147, 4152; *United States v. Bryan* (1950) 339 U. S. 323, 331). Her refusal to do so was misconduct of the gravest sort,* and justified to the full the inferences that were drawn against her by the Arbitration Board (*Caminetti v. United States* (1917)

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*In *Foreman v. Sandusky, D. & C. R. Co.* (1862) 2 Ohio Dec. Reprint 611, cited and quoted in the Annotation in 57 A.L.R. 81, the court said:

"'**It is very grave misconduct in a party, who has testified in her own behalf, to refuse upon cross-examination, to answer** * * * Where a party avails himself of his right to testify in his own behalf, justice to the adverse party requires a full and thorough cross-examination. And where, by his own misconduct, in contempt of the court, and in violation of the rights of his adversary, he refuses to answer, he should forfeit his right to have his testimony considered or his case heard, until he submits to testify. Such misconduct must, of necessity, materially affect the rights of the adverse party. * * * Certainly, it withholds from the jury what the adverse party has a legal right to have the jury know. And it is to be presumed that a refusal to answer secures an advantage which an answer would lose. In the case under consideration to support the action, the plaintiff relies, except in one par-

Exh. No. 6, Appendix, *infra*) and other damaging evidence concerning her Communist Party activities and received the full impact of her refusal to answer, on other than constitutional grounds, questions which all parties present understood as charging her with treason (R. 27).

The Board, as the trier of the facts, drew the inference of her personal dedication to "sabotage, force, violence and the like" from such evidence as her conceded abandonment of a career as a lawyer,—for which she had spent years in preparation with outstanding scholastic results,—for the purpose of being secreted in a strategic post in a labor union in a defense plant (*cf.* Jackson, J., concurring in *Dennis v. United States* (1951) 341 U. S. 494, 564, 565, quoted *supra* p. 17); from the fact that less than three months before she sought employment with respondent she had written a report to the State Headquarters of the Communist Party in which she affirmed that she tried to evaluate whatever she did "from the point of view of the welfare of the working class and the strengthening of the Party"; from the fact that at the risk of disgrace in her profession and probable disbarment she deliberately falsified her application for employment by respondent; from the fact that she was concededly aided in her deception by two professional persons, a dentist and another lawyer, who likewise acted at the risk of discipline within their respective professions; from the fact that on two occasions, once before a Trial Examiner for the National Labor Relations Board and again at the arbitration

242 U. S. 470, 494) and the denial of relief by the Court below (*Keystone Driller Company v. General Excavator Company* (1933) 290 U. S. 240, 244, and other authorities cited *supra*, p. 47).

In *Keystone Driller Company v. General Excavator Company, supra*, wherein the plaintiff had deliberately suppressed evidence, this Court denied relief, saying (290 U. S. 245):

> "This Court has declared: 'It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this Court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this Court the abetter of iniquity.'"

B. The decision below gave effect to the findings of Congress as evidence of public policy but it did not treat them as legislative adjudications of Mrs. Walker's guilt.

The findings of Congress in the Internal Security Act of 1950 and the Communist Control Act of 1954 were not used by the court below as proof of Mrs. Walker's guilt. Mrs. Walker had already been found guilty by the Arbitration Board. As the opinion below makes clear (R. 480-484), the court's reference to the Federal and State legislation and judicial decisions which it cited was for the purpose of explain-

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ticular, upon his own testimony. * * * **A cross-examination, the most thorough and efficacious test which the law has devised for the discovery of truth, is, under such circumstances, a right which cannot be too highly estimated.** To the full exercise of this right, the greatest latitude should be given. The plaintiff's refusal to answer withholds from the jury facts important to the issue, and her credibility as a witness.'"

hearing, she refused to answer on other than constitutional grounds specific questions concerning her Communist Party activities, including a statement attributed to her to the effect that she had given up the practice of law because there was little connection between the activities of professional people "and the class struggle"; and from the fact that she also refused to answer on other than constitutional grounds specific questions directed at establishing that her motives and objectives in seeking employment at respondent's plant were to "more actively and more effectively carry on the program and the activities of the Communist Party" (see dissenting opinion of Board Member J. Paul St. Sure, R. 39-43).*

As the opinion of the court below makes clear (R. 476), the function it performed in connection with this crucial finding of fact was to review the evi-

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*The right of the Arbitration Board to draw the inferences it did from Mrs. Walker's refusal to testify cannot be questioned. In *Caminetti v. United States* (1917) 242 U. S. 470, this Court said (pp. 494-495):

> "The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. **When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him.**
>
> * * *
>
> The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf."

dence before the Board for the purpose of satisfying itself that the finding was clearly supported by the evidence. In such review, it did not undertake to re-weigh the evidence or to draw any inferences from such evidence which differed from the inferences already drawn by the Board. It had no occasion to, and did not, apply any presumption, conclusive or otherwise, that all Communists are dedicated to sabotage, force, violence and the like. It was satisfied that the inference drawn by the Arbitration Board that Mrs. Walker was a "knowing and deliberately acting Communist" was amply justified, and its function with regard to fact-finding ended at this point. (*cf. Carlson v. Landon* (1952) 342 U. S. 524, 535-536).

In view of the foregoing, the authorities cited at pages 46 to 49 of petitioners' brief support respondent's position rather than that of petitioners.

In *Schneiderman v. United States* (1943) 320 U. S. 118, 157-158, this Court held that a conclusion that as of 1927 the Communist Party in the United States was dedicated to the overthrow of our Government by force and violence was both "tenable" and "possible."

In *Dennis v. United States* (1951) 341 U. S. 494, this Court, sitting in much the same position with relation to findings of fact of the lower courts as the position of the court below in this case with relation to the findings of the Arbitration Board, summarized the evidence concerning the objectives of the Communist Party which justified the inference there drawn that the Party advocated the overthrow of the Government of the United States by force and violence (p. 498),

and then stated the facts of common knowledge which confirmed the reasonableness and correctness of this inference (pp. 510-511, 547, 564-566).

In *American Communications Ass'n v. Doud* (1950) 339 U. S. 382, 388-389, 424-433, this Court referred to the great "mass of material" which justified Congress in inferring "that Communists and others proscribed by the statute [National Labor Relations Act, as amended, sec. 9(h)] had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action" (p. 389).

In *Emspack v. United States* (1955) 349 U.S. 190, 199, and *Quinn v. United States* (1955) 349 U.S. 155, this Court recognized that the answers to questions concerning Communist Party membership and activity would furnish a link in the chain of evidence needed in a prosecution under the Smith Act (*cf. Blau v. United States* (1950) 340 U.S. 159, 161).

In *Adler v. Board of Education* (1952) 342 U.S. 485, this Court held directly that membership in organizations proscribed by the Fienberg Act, particularly including the Communist Party, furnished a rational basis for a presumption of disloyalty, saying (pp. 494-495):

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative find-

ing that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. **We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion.''**

In *Gahan v. Press* (1954) 347 U.S. 522, 529, this Court held that in view of the findings of fact concerning the Communist Party which Congress incorporated into the Internal Security Act of 1950, the provision of that statute making present or former membership in the Communist Party, in and of itself, a ground for deportation did not constitute a classification "so baseless as to be violative of due process and therefore beyond the power of Congress."*

From these prior decisions of this Court it is abundantly clear that the inference drawn by the Arbitration Board, and confirmed by the court below, as to Mrs. Walker's personal dedication to "sabotage, force, violence and the like," was a reasonable and justifiable one.

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*The remaining authorities cited by petitioners at this point in their brief (*Peters v. Hobby* (1955) 349 U.S. 331, 345; *Anti-Fascist Committee v. McGrath* (1951) 341 U.S. 123; *Garner v. Los Angeles* (1951) 341 U.S. 716, 723-724; *Wieman v. Updegraff* (1952) 344 U.S. 183; *Farmer v. United Electrical Workers* (App. D. C. 1953) 211 F. (2d) 36; *National Labor Relations Board v. Pratt, Read & Co.* (C.A. 2d, 1951) 191 F. (2d) 1006; *United States v. Remington* (C.A. 2d, 1951) 191 F. (2d) 246) are not pertinent, and no purpose would be served by stating them.

B. The court below did not promulgate a novel public policy or undertake to establish a "security risk" program. It merely exercised a power universally claimed by courts in this country, including this Court, namely, that of refusing to permit its process to be used to enforce a demand which is against public policy.

We must admit much difficulty in unravelling the tortuous argument which weaves through pages 49 to 67 of petitioners' brief.

The court below has not undertaken to establish a "security risk" program by its decision. It was confronted with an arbitration award which directed the reinstatement into employment in a defense plant of a member of the Communist Party whom the Arbitration Board had found to be dedicated to that Party's program of "sabotage, force, violence and the like." It determined that the applicable statute of the State of California did not compel it to grant enforcement of such an award.

In so deciding the court below was exercising a power universally recognized as inhering in courts which apply the common law. Williston, in the passage from his treatise on *Contracts* cited by petitioners, recognizes that "the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is obviously necessary" (Rev. Ed., pp. 4557-4558). The power is one which this Court has exercised frequently and without suggestion of constitutional doubt (*supra*, p. 45).

Since the decision that the California statute permitted the courts to exercise this power with reference to the award is one as to the interpretation of a state

law, it is binding upon this Court (*Hebert v. Louisiana* (1926) 272 U. S. 312, 316) and the only question remaining open is whether the statute, as so interpreted, violates any right of petitioners under the United State Constitution or under a Federal statute.

The decision of this Court in *Dennis v. United States* (1951) 341 U. S. 494, makes abundantly clear that neither the First Amendment nor the Fourteenth Amendment gives petitioners the right to compel the restoration of Mrs. Walker to employment in respondent's plant in order to carry on more actively and more effectively the Communist Party program of sabotage, force, violence and the like. Hence, petitioners' citation (Br. 51-52) of decisions of this Court dealing generally with First Amendment rights in entirely different factual situations is not pertinent.

Meyer v. Nebraska (1923) 262 U. S. 390, 399; *Coppage v. Kansas* (1914) 236 U. S. 1, 14, and the other cases cited at pages 52 and 53 of petitioners' brief, do not hold that petitioners have a constitutional right to enforce a contract or demand which is against public policy. Whatever authority they still have (compare *Phelps Dodge Corp. v. National Labor Relations Board* (1951) 313 U. S. 177, 187; *Day-Brite Lighting v. Missouri* (1952) 342 U. S. 421, 423) extends only to the principle that individuals have the right to make and enforce proper contracts, which do not contravene policies reasonably established for the protection of others or the state (*West Coast Hotel Company v. Parrish* (1937) 300 U. S. 379, 392).

Since the court below did not claim the right to set up a "security risk" program for defense plants within California, and since we do not contend that such right exists, no purpose would be served by reviewing in detail the authorities cited at pages 53 to 65 of petitioners' brief. It is sufficient to say that the court did not hold, as petitioners claim (Br. 62) that "all Communists are so unquestionably dedicated to 'sabotage, force, violence and the like,' that the point may be conclusively presumed as a matter of law." What the court did, as clearly appears from its opinion (R. 476, 480, 484), was to satisfy itself that the particular Communist before it, namely, Mrs. Walker, had been found by the Arbitration Board upon sufficient evidence to be a member of the Party "with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail," and then to set forth, as the basis for its public policy decision, what Congress, the President, this Court and lower Federal courts, the California Legislature and the California courts have said concerning the full implications of Party membership. It concluded from this review that, in the face of such a finding, it would be against public policy to direct the reinstatement of this particular Communist to employment at respondent's plant.

Petitioners' argument (Br. 65-67) that the decision below deprived them of procedural due process comes with poor grace from their side of this controversy. Throughout the courts below, we contended, and we

still contend (*infra*, pp. 78-79), that Mrs. Walker's refusal to answer material questions concerning her Communist Party membership and activities, and the refusal of the Arbitration Board to instruct her to answer these questions, denied respondent its right of cross-examination and thereby deprived it of a fair hearing (R. 35-36). With the shoe on the other foot, petitioners now press upon this Court the conceded fact that the right to cross-examine witnesses is an important element of a fair hearing or trial (Br. 65, n. 25).

Petitioners misstate the record when they assert that in none of the tribunals which preceded the court below "were the doctrines of the Communist Party, or Mrs. Walker's own propensities for sabotage, etc., regarded by the adjudicating body as material" (Br. 65-66). Mrs. Walker, petitioners and their attorney were told specifically by the Arbitration Board that questions concerning her Communist Party membership and activities were deemed material and that the Board would draw all justifiable inferences from her failure to answer the questions (R. 21, 160-161; *supra*, pp. 6-7). Mrs. Walker was given every opportunity to deny that she sought employment in respondent's plant as the "rigidly and ruthlessly disciplined" agent of a foreign power and to explain, if she could, the mass of incriminating evidence marshalled against her. She deliberately refused to accept this opportunity and she cannot now complain that she was denied a fair trial (*United Fuel Gas Co. v. R. R. Comm.* (1929) 278 U. S. 300, 307; *Hurley v. Commission of Fisheries*

(1921) 257 U. S. 223, 225; *Booth Fisheries v. Industrial Comm.* (1926) 271 U. S. 208, 211).

V.

ANSWER TO POINT TWO: THE DECISION BELOW DID NOT DEPRIVE MRS. WALKER OF A JUDICIAL TRIAL OR GIVE EFFECT TO FEDERAL AND STATE STATUTES AS LEGISLATIVE ADJUDICATIONS OF MRS. WALKER'S GUILT.

A. Mrs. Walker had a full opportunity to present a defense against respondent's charges before the Arbitration Board but she deliberately refused to do so.

In its consideration of point two of petitioners' argument this Court should have in mind that petitioners and Mrs. Walker were the ones who selected the tribunal before which her claim was heard. They had notice of the hearing before the Board, they were represented by counsel at the hearing, and they had full opportunity to offer testimony and other evidence in behalf of their case, to examine the evidence against them and to confront and cross-examine witnesses supporting the charges against Mrs. Walker.

When the Arbitration Board issued its award neither petitioners nor Mrs. Walker complained that they had been denied a fair hearing. Instead they became the active protagonists of the award before the courts, asserting with vigor and success that the courts could not reexamine the evidence before the Board or set aside any of its findings of fact (R. 76, 84).

From the outset respondent contended that the award carried the seed of its own destruction in the

finding that Mrs. Walker was a member of the Communist Party "with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail." The point that to enforce such an award would be against public policy was made in respondent's first pleadings (R. 36, par. III (f); R. 48, par. 1), and pressed at every stage of the proceedings in the trial court; it was made before the District Court of Appeal, which undertook to answer it (App. to Pet., pp. 71-72); and it was made on petition for a hearing by the California Supreme Court and pressed at the oral argument before that court (R. 469, 478-479).

Respondent likewise presented the issue of illegality from a somewhat different angle. Since its claim was that the award was illegal, and since the California Supreme Court had said in *Loving & Evans v. Blick* (1949) 33 Cal. (2d) 603, 609-612, that the issue of the illegality of an arbitration award was for the trial court to determine upon evidence presented to it, respondent pleaded as an affirmative defense that at the time of the discharge, at the time of the hearing before the Arbitration Board and at the time of the pleading Mrs. Walker was an active member of the Communist Party dedicated to that Party's program of subversion, espionage, sabotage, force and violence (R. 36-37). Respondent was prepared to support its charges with proof but petitioners secured a ruling from the trial court which blocked any trial on the affirmative defense (R. 77-78, 87).

In the face of this record petitioners have no standing to complain that Mrs. Walker "has not had the benefit of a judicial trial." She had the full benefit of the only hearing she sought, namely, the hearing before the Arbitration Board, and her performance before that tribunal gives substantial reason to believe that she would not have dared subject herself to the contempt powers of a judicial tribunal (see *infra*, pp. 88-89).

Respondent, and not Mrs. Walker, was the party who was deprived of a fair hearing. Mrs Walker was permitted to testify in detail in support of her claim (R. 92-128), and to state her motives in leaving her career as a lawyer (R. 94), in seeking employment at respondent's plant (R. 97), and in falsifying her employment application (R. 101). When respondent sought to cross-examine her concerning this testimony, and particularly concerning her motives, she refused to answer material questions and this refusal was condoned by the Arbitration Board (*supra*, pp. 6-7).

By taking the stand in her own behalf Mrs. Walker waived any right she might otherwise have had to remain silent on constitutional grounds, and it was her duty to submit herself to cross-examination (*Powers v. United States* (1912) 223 U. S. 303, 314; *Fitzpatrick v. United States* (1900) 178 U. S. 304, 315; *Raffel v. United States* (1926) 271 U. S. 494, 497). As this Court said in the *Raffel* case, *supra*, at p. 499:

ing the meaning of the term "full implications . . . of Party membership," as used in the crucial finding, and setting forth the evidence of the public policy which restrained the courts from enforcing an award containing such a finding. These are the sources of public policy on which this Court itself has drawn (*supra*, p. 45) and it has never yet suggested that in so doing the sources have been turned into "bills of attainder."

The facts involved in *Cummings v. Missouri* (1867) 4 Wall. 277; *Ex Parte Garland* (1867) 4 Wall. 333, and *United States v. Lovett* (1946) 328 U. S. 303, are not parallel in any respect to the facts involved in this case, and those decisions have no conceivable relevancy. The Arbitration Board was satisfied from the evidence that Mrs. Walker was a knowing and dedicated participant in the program and activities of the Communist Party, and it spread its conclusion on the face of its award for all to read. The legal result declared by the court below flowed from the fact as found by the Arbitration Board, and it was not in any sense the infliction of punishment without a judicial trial.

VI.

ANSWER TO POINT THREE: THE COURT BELOW DID NOT DECLARE A PUBLIC POLICY WHICH WAS NOT IN EXISTENCE WHEN MRS. WALKER WAS DISCHARGED NOR DID IT, BY CITING CERTAIN RECENTLY ENACTED STATUTES AS EVIDENCE OF PUBLIC POLICY, GIVE THOSE STATUTES THE EFFECT OF LAWS IMPAIRING THE OBLIGATION OF PETITIONERS' CONTRACT WITH RESPONDENT.

The public policy which the court below applied in this case was the policy which leads the courts to withhold their aid from those who would overthrow our Government by force and violence; namely, the policy against treason. This is not a new public policy, but is one that has existed since the inception of the Government.

This Court has declared that "No crime is greater than treason" and has unhesitatingly stricken down contracts which have contravened the policy against treason (*Hanauer v. Doane* (1871) 12 Wall. 342, 346; *Texas v. White* (1869) 7 Wall. 700, 734; *United States v. Grossmayer* (1870) 9 Wall. 72, 76). In *Hanauer v. Doane,* supra, it said (12 Wall. 345):

> "Any contract, tinctured with the vice of giving aid and support to the Rebellion, can receive no countenance or sanction from the courts of this country."

In *Hale v. Sharp* (1866) 44 Tenn. 275, the Supreme Court of Tennessee invoked this policy in setting aside an arbitration award, saying (pp. 287-288):

> "It is further insisted, that, notwithstanding the consideration for the note was illegal, and the contract contrary to public policy, yet, the

parties having voluntarily submitted the matter in dispute, to arbitration, they are bound by the award, and the defendant, Sharp, is entitled to the sum stipulated in the award. Such a proposition can not be maintained, upon either principle or authority. So to declare the law, would be to hold, that by the devise of resorting to this domestic tribunal, public policy, and the interests of the public under the Constitution, Laws and Government of the United States, may be defeated and ignored, and a policy wholly inimical thereto, substituted, which the Courts of the country are bound to enforce. No one can fail, for one moment, to see how pernicious such a precedent would be. It would directly indicate to all, who, in the future, might conceive the design of conspiring for the overthrow of public morals and religion, the destruction of the peace and happiness of society, or for the subversion of the Government, or the usurpation of its powers, that notwithstanding such conspiracy and every thing which may be done in furtherance of such designs, is unlawful and contrary to public policy, yet, within their own precincts, is to be found a convenient means, by which they may readily cheat the law, defeat public policy, and give validity to their contracts, however violative of public policy, or however prejudicial to the public interest, entered into in aid of the conspiracy. A proposition so repugnant to all our conceptions of public policy, and of the spirit and majesty of the law, can not, for one moment, be entertained.

The award, upon its face, shows that the consideration of the note was Confederate Treasury Notes; and this note forms the basis of the award.

> It was an effort upon the part of the arbitrators, to do that which was not only forbidden by law, but which the parties themselves could not lawfully do. It is, therefore, simply void, and forms no obstacle to the relief sought by complainants."

The court below did not hold that petitioners' contract with respondent was invalid or against public policy. Its holding was directed solely against the award and rested squarely upon the invalidity which flowed from the crucial finding of fact. It cited the Internal Security Act of 1950, the Communist Control Act of 1954, and recent State legislation as current manifestations of the concern with which both Congress and the California Legislature have for years regarded efforts to overthrow the Government by force and violence. In the final analysis, its decision was based "upon the general principles by which courts determine that a transaction is good or bad on principles of public policy" (*Tarver v. Keach* (1872) 82 U. S. 67), and as such it presents no issue of impairment of any contractual obligation (*Stevenson v. Williams* (1873) 86 U. S. 572; *Chicago & Alton R. R. v. Wiggins Ferry Co.* (1877) 119 U. S. 615, 624; *N. O. Waterworks v. Louisiana Sugar Co.* (1887) 125 U. S. 18, 34).

VII.

ANSWER TO POINT FOUR: THE ENACTMENT BY CONGRESS OF THE SMITH ACT, THE INTERNAL SECURITY ACT OF 1950 AND THE COMMUNIST CONTROL ACT OF 1954 DID NOT HAVE THE RESULT OF PROHIBITING A STATE FROM WITHHOLDING THE PROCESS OF ITS COURTS FROM THE ENFORCEMENT OF AN ARBITRATION AWARD WHICH DIRECTS THE REEMPLOYMENT IN A DEFENSE PLANT OF A MEMBER OF THE COMMUNIST PARTY WHO IS DEDICATED TO THAT PARTY'S PROGRAM OF SABOTAGE, FORCE, VIOLENCE AND THE LIKE.

We have already answered Point Four under subdivision III of our argument (*supra*, pp. 49-65). We cannot pass without comment, however, the suggestion made before the Arbitration Board (R. 25-26), and repeated before this Court (Pet. Br. 40, 79, 82), that this case has "overtones involving foreign policy" and that the problem of dealing with knowing and deliberately acting Communists in defense plants in this country "is international, and its connection with the field of foreign relations is close".

The suggestion that the Soviet Government has the same interest in the manner in which we treat American Communists dedicated to its service that a foreign country would have in the way we treat its nationals is odious to us, as we know it will be to this Court. Congress has said in this field, as it did not say in the field of alien registration, that "An attack must be made upon all fronts if we are to meet [the Communist problem] successfully" (*supra*, p. 56). In this setting the legislation which it has enacted cannot be construed as giving knowing and dedicated Communists employment "rights" in de-

fense plants or as abrogating settled principles whereby courts protect their process from subversion in aid of illegal and nefarious schemes.

VIII.

ANSWER TO POINT FIVE: THE LABOR MANAGEMENT RELATIONS ACT OF 1947 DOES NOT GIVE A KNOWING AND DELIBERATELY ACTING COMMUNIST A RIGHT TO BE REINSTATED TO EMPLOYMENT IN A DEFENSE PLANT. IN ANY EVENT, PETITIONERS AND MRS. WALKER HAVE WAIVED ANY RIGHTS GIVEN BY THAT ACT.

We have already noted that the facts of this case present a striking example of a type of conduct which has given Congress grave concern; namely, the abuse of the rights given and processes provided by the Labor Management Relations Act for the purpose of compelling employers to retain active and dedicated Communists in strategic posts in industry.

When respondent first began to suspect the true character and motives of Mrs. Walker in 1947, petitioners were quick to invoke the unfair labor practice provisions of the Act to head off, with success, any more detailed investigation at that time (R. 471; *supra,* p. 22). Shortly thereafter a costly strike ensued, in the course of which the union committed acts which an arbitrator subsequently found were unjustifiable and "not privileged" (*In re Cutter Laboratories,* November 25, 1947, 9 L.A. 187, 194).*

*The arbitration grew out of the exercise by respondent of its claimed right to discharge two employees, Vanbebber and Nash, for conduct during the strike which respondent charged was sabotage.

Nevertheless respondent continued to honor its commitment, made as a part of the strike settlement, that "operations shall be resumed on a basis of cooperation without being hampered by further disagreement over past issues" (9 L.A. 188).

Since Mrs. Walker was an officer of the union, she received "more breaks" than the average employee (R. 30, 477), and respondent's action to discharge her came only after it had uncovered "previously unknown conduct" which had convinced it that she was an active and dedicated Communist (R. 9). Respondent placed this evidence before the Arbitration Board, which agreed with respondent's conclusion and found as a fact that Mrs. Walker was a member of the Communist Party "with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail". Notwith-

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The arbitrator found that the conduct was directed by the union (petitioners herein) and that while the conduct was not legitimate strike activity, respondent had condoned it by settling with the union.

The arbitrator said the following concerning the conduct of the union officials, including Mrs. Walker (9 L.A. 194):

> "The evidence as a whole fairly sustains a finding that the authorized union officials were not so much concerned with protecting machinery as with preventing the possibility of continued operations and spoiling materials in process and products on hand.
>
> "They were not content merely to order a strike. They unjustifiably usurped the management's superior right to determine what should be done and ordered the machinery shut down for the purpose of spoiling materials and products, as well as preventing further production. Insofar as they thus deliberately intended to inflict damage upon company property their action was not privileged. It clearly exceeded the scope of legitimate strike activity and provided a basis for legal liability of the union for any resulting damage."

standing this finding, however, petitioners have continued to insist that respondent reinstate and retain Mrs. Walker in its employ, and have pressed their case through to this Court.

Congress did not intend that the rights given by the Labor Management Relations Act be a shield for improper or illegal conduct, and neither this Court nor the National Labor Relations Board has construed them as such (*International Union UAW v. Wisconsin Empl. Rel. Bd.* (1949) 336 U.S. 245, 260, 264; *Southern S. S. Co. v. National Labor Relations Board* (1942) 316 U.S. 31, 47; *Mackay Radio and Telegraph Company, Inc.* (1951) 96 N.L.R.B. 740, 742).

If this Court were to hold that an active, dedicated Communist has a right to reinstatement under the Labor Management Relations Act, it would go beyond even the holding of the Arbitration Board, which conceded that absent the circumstances of alleged condonation respondent was entitled to discharge Mrs. Walker for her Communist Party membership and activities (*supra*, pp. 20-24). As this Court said in *International Union, UAW v. Wisconsin Empl. Rel. Bd.*, *supra*, at p. 264:

> "To dismiss or discipline employees for exercising a right given them under the Act or to interfere with them or the union in pursuing it is made an unfair labor practice and *if the rights here asserted are rights conferred by the Labor Management Relations Act, it is hard to see how the management can take any steps to resist or combat them without incurring the sanctions of the Act.*"

It is certain that the conduct involved in this case is far more reprehensible than that involved in the *International Union, UAW* case and that a holding that the conduct is protected by the Labor Management Relations Act would be inconsistent with the whole purpose of that Act and of the other subsequent Acts dealing with the Communist problem in industry.

We point out, further, that initially petitioners and Mrs. Walker had a choice between proceeding under the grievance procedure of the collective bargaining agreement or filing unfair labor practice charges with the National Labor Relations Board (*National Labor Relations Board v. Walt Disney Productions* (C.A. 9th, 1945) 146 F. (2d) 44, 48; *National Labor Relations Board v. International Union* (C.A. 7th, 1952) 194 F. (2d) 698, 702). Petitioners elected to proceed before the Arbitration Board, and the circumstances are persuasive that this was the result of a deliberate choice.

Mrs. Walker had had a prior experience before a Trial Examiner for the National Labor Relations Board, who had proved not to be as considerate of her "private beliefs" as was the Arbitration Board (*supra*, p. 13). She engaged in the same contemptuous conduct before him as she later exhibited before the Arbitration Board, but with entirely different results. The Trial Examiner struck her entire testimony and disallowed her claim.

Mrs. Walker undoubtedly also had in mind that as an attorney she incurred special risks when she sub-

jected herself to a tribunal with greater authority and more judicial attributes than an Arbitration Board. Since she knew that her Communist Party membership and activities would be in issue, and since she intended to refuse to answer any questions concerning them, caution dictated that she avoid a hearing before any tribunal which might accord respondent the right to have her placed under the contempt power of a court.

Having deliberately elected to proceed before the Arbitration Board, and to invoke the process of the State courts to enforce its award, petitioners and Mrs. Walker are estopped to claim that these courts have deprived them of rights under the Labor Management Relations Act (*Booth Fisheries v. Industrial Comm.* (1926) 271 U. S. 208, 211; *Hurley v. Commission of Fisheries* (1921) 257 U. S. 223, 225; *United Fuel Gas Co. v. R. R. Comm.* (1929) 278 U. S. 300, 307).

IX.

THE FEDERAL QUESTIONS ASSERTED BY PETITIONERS WERE NOT RAISED IN THE COURTS BELOW IN A TIMELY MANNER.

By granting certiorari this Court called for a full presentation of arguments on the merits of the controversy, which has been made in the preceding pages. At this point we respectfully renew the contention we made in respondent's brief in opposition to the petition for certiorari (pp. 23-24) that the Federal ques-

tions asserted by petitioners were not raised in the courts below in a timely manner.

The court below upheld a defense which was asserted by respondent at the outset of its pleading in the trial court (R. 48) and maintained at every stage thereafter (R. 77-78). As appears from the opinion of the District Court of Appeal (App. to Pet., pp. 54-71), the defense constituted respondent's "main contention" before that Court and was seriously and extensively considered by the Court (App. to Pet., pp. 71-76). The defense was the first point raised in respondent's petition to the California Supreme Court for a hearing (R. 478-479).

Unless it can be said that no litigant can be expected to anticipate that he will lose his case, petitioners were bound to anticipate that the decision of the court below might be favorable to the defense. The defense was based upon an existing circumstance, namely, the finding of the Arbitration Board that Mrs. Walker was a member of the Communist Party "with the full implications of dedication to that Party's program of sabotage, force, violence and the like." If, in petitioners' opinion, a decision upholding the defense would deprive them of any right, privilege or immunity under the Constitution or statutes of the United States, they were obligated to present such contention to the court below at a stage prior to their petition for rehearing. Having failed to do so, they are foreclosed from urging the contention at this time as a basis for review by this Court (*American Surety Co.*

v. Baldwin (1932) 287 U. S. 156, 163; *Herndon v. Georgia* (1935) 295 U. S. 441, 443).

CONCLUSION.

The court below was presented with an arbitration award which, in its view, found as a fact that Doris Brin Walker was a member of the Communist Party dedicated to that Party's program of sabotage, force, violence and the like. It knew from the record that Mrs. Walker had been given every opportunity to defend against the charges embodied in this finding but had contemptuously refused to do so. It was being asked to order her reinstatement into employment in respondent's defense plant notwithstanding the certainty, established by the Board's finding, that her purpose was to carry on more actively and effectively the program and activities of the Communist Party.

The court below refused to confirm the award, or lend its process to enforcement of the award, in a decision which set forth in clear and unmistakable terms the implications of what it was being asked to do.

Petitioners, in their brief before this Court, chose not to meet the issue posed by the decision below, but instead seek to have this Court either give a different interpretation to the crucial finding of the Arbitration Board or set the finding aside as without evidentiary support. In view of this approach to the case the actual decision of the court below remains unchal-

lenged, even by petitioners, and for the reasons set forth in this brief, we respectfully submit that the decision should be affirmed by this Court.

Dated, San Francisco, California,
April 18, 1956.

Respectfully submitted,

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(Appendix Follows.)